Editor's note: 96 I.D. 83

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., PETITIONERS

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, RESPONDENT

WEST ELK COAL CO., INTERVENOR

STATE OF COLORADO, INTERVENOR

IBLA 87-200 Decided March 15, 1989

Petition for award of costs and expenses, including attorneys' fees, filed pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), and the regulations at 43 CFR 4.1290 - 4.1296.

Petition approved in part; information requested.

l. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Generally

The provision for the awarding of costs and expenses, including attorneys' fees, in sec. 525(e) of the Surface

Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), is applicable to permit review proceedings initiated and prosecuted pursuant to sec. 514 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1264 (1982).

2. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

Regulation 43 CFR 4.1294 provides that in order to recover an award of costs and expenses, including attorneys' fees, from a permittee, there must, inter alia, be a finding that the permittee violated the Surface Mining Control and Reclamation Act of 1977, the regulations promulgated pursuant to that Act, or a permit condition. Where in a proceeding to review the issuance of a permit to mine there is no such finding, a petitioner may not recover an award from the permittee.

3. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award--Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Substantial Contribution

Under 43 CFR 4.1294(b), a person who initiates or participates in a proceeding under the Surface Mining Control and Reclamation Act of 1977 may be eligible for an award of costs and expenses, including attorneys' fees, from OSMRE where that person prevails in whole or in part, achieving at least some degree of success on the merits. However, to be entitled to an award the regulation

requires that the record show that the person made a substantial contribution to a full and fair determination of the issues.

4. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

A person challenging issuance of a permit to mine will be deemed eligible for an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), and 43 CFR 4.1294(b), where the person achieved at least some degree of success on the merits. A finding by the Board of Land Appeals that, in part, vindicated the person's position that

the permit was improperly issued, constitutes some degree of success on the merits even though the Board did not grant the ultimate relief requested by the person.

5. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

Where one is determined, pursuant to 43 CFR 4.1294(b), to be eligible for and entitled to an appropriate award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), a further determination must be made of what issues are compensable. This inquiry requires the identification of successful claims and those claims sufficiently related to the successful ones to warrant an award for time spent thereon. Unsuccessful claims unrelated to successful ones will not be compensated.

6. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

In determining the amount of an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), the Board of Land Appeals will use the "lodestar" formula, i.e., the number of hours reasonably expended on qualifying work multiplied by the reasonable hourly rate. There is a strong presumption that the lodestar represents the reasonable fee to which counsel is entitled.

7. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

A person challenging issuance of a permit to mine may receive an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), for work performed in preparing and filing the petition for review of the permit. However, such an award will not include compensation for work performed in state proceedings involving the same minesite and a related state permitting process.

8. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

A person challenging issuance of a permit to mine may receive an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), for work performed with respect to procedural victories which contributed to the person achieving some degree of success on the merits. However, OSMRE is not liable for attorneys' fees for procedural victories against parties other than OSMRE.

9. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

In determining the number of hours reasonably expended on qualifying work with respect to an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), where the petitioner had achieved at least some degree of success on the merits, the Board may utilize, in the absence of an alternative approach, a page-counting method whereby the petitioner's major pleadings at various stages of the proceeding are examined to determine the number of pages devoted to a particular issue out of the total pages in the document. That percentage is then applied to the total number of hours sought to arrive at the number of hours reasonably expended.

10. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

A person challenging issuance of a permit to mine is not entitled to an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), for work performed on unsuccessful settlement negotiations where the petitioner makes no attempt to relate the hours claimed to any particular entry on the attorneys' time records or to limit the hours claimed to only those issues upon which petitioner was ultimately successful.

11. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

A person who is eligible and entitled to an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), may also receive compensation for work performed in prosecuting the petition for an award, commensurate with the degree of success achieved in the underlying proceedings.

12. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

In determining the reasonable hourly rate for purposes of calculation of the "lodestar" amount in an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), the Board will use that market rate prevailing at the time of the relevant administrative proceedings

in the community where the proceedings took place. However, where the petitioner for an award can show that counsel with specialized expertise was essential to prosecution of the case, the Board may approve an hourly rate from the area where such counsel customarily practices.

13. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

No enhancement of a "lodestar" amount will be granted in an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), based on the contingency of the award, where the success and impact of the case were not exceptional.

14. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

A person challenging issuance of a permit to mine may receive an award of expenses under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), for the expenses of an expert witness who assisted the person in preparing and presenting its case, commensurate with the degree of success achieved by the person on those issues addressed by the expert.

15. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

A person challenging issuance of a permit to mine may receive an award of expenses under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), for those expenses which are normally passed along to clients of the attorney representing that person, commensurate with the degree of success achieved by the person in the proceedings in question.

APPEARANCES: L. Thomas Galloway, Esq., and Daniel B. Edelman, Esq., Washington, D.C., and Albert H. Meyerhoff, Esq., San Francisco, California, for Natural Resources Defense Council, Inc., et al.; Robert E. Benson, Esq., Timothy M. Rastello, Esq., Myron J. Hess, Esq., Denver, Colorado, and

Thomas F. Linn, Esq., Atlantic Richfield Company, Denver, Colorado, for

West Elk Coal Company, Inc.; Linda E. White, Esq., Office of the Attorney General, State of Colorado, Denver, Colorado, for the State of Colorado; Anne C. Sanders, Esq., and Glenda H. Owens, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

This case concerns a petition filed by the Natural Resources Defense Council, Inc., and various named individuals (NRDC et al. or petitioners) 1/ pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1275(e) (1982), and 43 CFR 4.1290-4.1296, for the award of costs and expenses, including attorneys' fees, incurred in connection with various proceedings before the Department of the Interior.

I. FACTUAL AND PROCEDURAL BACKGROUND

The present case is the culmination of a lengthy series of proceedings which began with the August 11, 1981, filing by NRDC et al. of a petition for review of approval by the Office of Surface Mining Reclamation and Enforcement (OSMRE) of an application by the ARCO Coal Company (ARCO), a division of the Atlantic Richfield Company, for a permit to conduct surface coal mining operations on Federal land at the Mt. Gunnison No. l Mine in _____

1/ The individual petitioners are Jamie A. and Dolores V. Jacobson, Mitchell N. and Sally R. Swain, Susan L. and Carl T. Brater, Mark Welsh, Charles V. Worley, Bradley E. Klafehn, and Charles H. Gilman, Jr.

Gunnison County, Colorado. 2/ Jurisdiction over the review petition of NRDC et al. was initially lodged with the Interior Board of Surface Mining and Reclamation Appeals (IBSMA). In their petition, NRDC et al. charged that ARCO's permit application had been improperly approved, asserting in part that the Director, OSMRE, had failed to make independent findings that ARCO had affirmatively demonstrated that the proposed mine would comply with all the requirements of SMCRA and its implementing regulations and that such an affirmative demonstration had not been made. NRDC et al. sought a declaration that the permit application had been improperly approved and that the permit was, therefore, "null and void and of no force or effect." Natural Resources Defense Council, Inc. v. OSMRE, 4 IBSMA 4, 5 (1982).

By order dated August 28, 1981, IBSMA granted requests by ARCO and the State of Colorado to intervene as parties in the review proceeding and directed briefing by all of the parties on the issues raised by the petition. The parties subsequently filed various motions and briefs, including a motion to dismiss filed by ARCO, in which the State joined, and a motion to dismiss filed by OSMRE. IBSMA denied OSMRE's motion to dismiss by order dated December 9, 1981. IBSMA held oral argument on December 15, 1981, and directed further briefing. The parties also engaged in unsuccessful settlement negotiations. Thereafter, in a February 24, 1982, order, IBSMA denied ARCO's motion to dismiss. In that order IBSMA also referred the question

2/ The permit (CO-0021), approved July 12, 1981, by OSMRE, authorized underground coal mining and reclamation operations for a period of 5 years on approximately 2,520 acres of private and Federal land. Such operations were envisioned by ARCO as part of a 40-year mining operation which would encompass 14,304 acres of land and recover an estimated 59 million tons of coal over the life of the mine.

of the propriety of OSMRE's approval of ARCO's permit application to the Hearings Division, Office of Hearings and Appeals, for a hearing and recommended decision by an Administrative Law Judge. IBSMA specifically directed the Hearings Division to "set forth every material requirement for an application and an approval document and specify whether or not and when there was compliance." Natural Resources Defense Council, Inc. v. OSMRE, 4 IBSMA at 16. IBSMA assigned the burden of proof to NRDC et al.

Administrative Law Judge David Torbett held a hearing on May 25 through 27, 1982, and on June 15 and 16, 1982, at which NRDC et al., OSMRE, ARCO, and the State of Colorado appeared. On June 24, 1983, Judge Torbett issued a decision recommending affirmance of OSMRE's approval of ARCO's permit application. By order dated July 8, 1983, this Board, to whom jurisdiction over appeals arising under SMCRA had been transferred concurrently with the abolition of IBSMA (48 FR 22370 (May 18, 1983)), established a schedule for the filing of exceptions to Judge Torbett's recommended decision. NRDC et al. and ARCO filed exceptions, and on September 27, 1985, the Board addressed those exceptions in Natural Resources Defense Council, Inc. v. OSMRE, 89 IBLA 1, 92 I.D. 389 (Natural Resources Defense Council I), appeal dismissed, Natural Resources Defense Council, Inc. v. Hodel, No. 86-K-2535 (D. Colo. June 30, 1988). 3/

3/ ARCO's exceptions were limited to the question of NRDC et al.'s standing to seek review of OSMRE's approval of ARCO's permit application and were briefly dealt with by the Board, after reviewing Judge Torbett's findings and conclusions in this respect, by essentially reaffirming IBSMA's conclusion that the individual petitioners and NRDC, on behalf of its members, had standing. 89 IBLA at 7-10, 92 I.D. at 393-94.

Before the Board, NRDC et al. raised numerous objections to OSMRE's approval of ARCO's permit application for the Mt. Gunnison No. l mine. In reviewing the objections relating to the hydrologic impact of mining and reclamation operations, we sustained NRDC et al.'s contention that OSMRE had failed to properly assess the probable cumulative impact (PCI) of all anticipated mining in the area on the hydrologic balance, specifically the "surface and ground water systems of the general area of the proposed mining operation." Natural Resources Defense Council I, 89 IBLA at 33, 92 I.D. at 405. We rejected certain subsidiary questions, concerning whether OSMRE had, for purposes of making the proper PCI assessment, properly defined all anticipated mining; identified the relevant ground water basin; used a control watershed for comparison purposes; identified baseline conditions; and generally developed information appropriate for such an assessment. Natural Resources Defense Council I, 89 IBLA at 13, 18-19, 23, 25-28, 92 I.D. 385, 397-98, 400, 401-03. We also rejected NRDC et al.'s contention that ARCO had failed to determine the probable hydrologic consequences of mining and reclamation operations, in accordance with section 507(b)(11) of SMCRA, 30 U.S.C. | 1257(b)(11) (1982). Natural Resources Defense Council I, 89 IBLA at 69, 92 I.D. at 422.

The Board rejected all other objections raised by NRDC et al., except for two concerning stipulations contained in the approved permit. The Board agreed with the charge made by NRDC et al. that OSMRE had failed to require ARCO to submit, in accordance with 30 CFR 785.19(d) (1981), information regarding the impact of mining and reclamation operations on an alluvial

valley floor (AVF) prior to issuance of ARCO's permit. We based this conclusion principally on the fact that OSMRE had not even identified the AVF until permit issuance. Natural Resources Defense Council I, 89 IBLA at 55-56, 92 I.D. at 415-16. The Board also sustained the charge made by NRDC et al. that OSMRE erred in failing to require ARCO to submit, in accordance with 30 CFR 784.14(b)(1) (1981), a sedimentation control plan for a loadout facility prior to issuance of ARCO's permit. Natural Resources Defense Council I, 89 IBLA at 60, 92 I.D. at 417.

The result of the Board's initial decision in Natural Resources Defense Council I, supra, was that it sustained three of the objections raised by NRDC et al. In all other respects, OSMRE's decision to issue ARCO's permit was affirmed. For the purpose of determining the appropriate relief to be granted regarding the three deficiencies in the permit application approval process and in accordance with the understanding of the parties, we afforded the parties an opportunity to brief this matter. NRDC et al., West Elk Coal Company, Inc. (West Elk), 4/ the State of Colorado, and OSMRE each filed a brief.

On November 18, 1986, the Board issued a decision which dealt with the question of appropriate relief concerning the three identified deficiencies. Natural Resources Defense Council Inc. v. OSMRE (Natural Resources Defense

4/ By order dated Nov. 22, 1985, the Board granted West Elk's motion to substitute itself for the Atlantic Richfield Company as intervenor in this case.

Council II), 94 IBLA 269, 93 I.D. 417 (1986). 5/ NRDC et al. had requested that the Board vacate West Elk's permit in part, direct the cessation of mining operations, and remand the case to OSMRE for preparation of a proper PCI assessment. In our decision, we found that the PCI deficiency had been rectified by the State's preparation of a PCI assessment, relating to two proposed revisions of West Elk's permit and mine plan, and the subsequent approval of those revisions and mining plan amendments in 1985 by the State and OSMRE, respectively, without objection by NRDC et al. Id. at 294-95, 93 I.D. at 431. The Board concluded that, based on petitioners' acquiescence to the State's PCI assessment, no relief was appropriate.

For the alluvial valley floor determination, the Board concluded that OSMRE's failure to require pre-permit information regarding the AVF had been rectified by the petitioners' failure to comment on the proposed approvals and the State's determination, in connection with the above-mentioned revisions, that the AVF would not be affected by mining operations. Id. at 297, 93 I.D. at 432. We concluded that NRDC et al. was not entitled to any relief.

OSMRE's failure to require pre-permit information regarding a sedimentation control plan for the loadout facility, we held, was a technical deficiency, in view of the fact that the sedimentation control plan was

---

5/ In addition, the Board addressed the question of its jurisdiction to resolve the matter of appropriate relief in response to a contention by West Elk that the Board lacked such jurisdiction. We concluded that the Board had jurisdiction. Natural Resources Defense Council II, 94 IBLA at 277, 93 I.D. at 421-22, appeal dismissed, Natural Resources Defense Council, Inc. v. Hodel, No. 86-K-2535 (D. Colo. June 30, 1988).

submitted to the State prior to any construction, albeit after permit issuance, and subsequently approved by the State. Id. at 299, 93 I.D. at 433. However, recognizing that NRDC et al. had not had an opportunity to comment on the plan prior to its approval, the Board afforded NRDC et al.
a 30-day period following receipt of the Board's decision to request the State for a comment period. Id. at 300, 93 I.D. at 434. We stated that this opportunity was not to affect any ongoing operations by West Elk.

At the conclusion of Natural Resources Defense Council II, supra,
we noted that NRDC et al. had asserted their entitlement to an award of attorneys' fees and expenses. We found that a ruling on entitlement to attorneys' fees and expenses was premature and stated that any party could seek an award of fees and expenses within 45 days of receipt of our decision in accordance with the procedures in 43 CFR 4.1290 - 4.1295.

On January 2, 1987, NRDC et al. filed a petition for the award of $360,914.80 in attorney's fees and $16,683.79 in costs and expenses (hereinafter Petition), in accordance with section 525(e) of SMCRA, which provides:

> Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the

Secretary, resulting from administrative proceedings, deems proper.

30 U.S.C. | 1275(e) (1982).

Petitioners contend that they are entitled to an award of costs and expenses, including attorneys' fees, because they were initiating parties who "prevail[ed] in whole or in part, achieving at least some degree of success on the merits," in accordance with 43 CFR 4.1294(b), and the Supreme Court's pronouncement in Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983). They argue that the extent of the award should be commensurate with the degree of their success on the merits in accordance with the standard enunciated in Hensley v. Eckerhart, 461 U.S. 424 (1983), that attorneys' fees be awarded for work performed on successful and related unsuccessful claims. 6/ NRDC et al. then apply this standard to "seven major categories of legal work" performed in connection with the case: (1) preliminary

work up to and including preparation and filing of the original petition

for review; (2) work in connection with procedural matters arising before

6/ In a footnote to the petition, at page 4, NRDC et al. note that the Departmental regulation which limits awards to a person "who prevails in whole or in part, achieving at least some degree of success on the merits" (43 CFR 4.1294(b)) was amended effective Dec. 16, 1985 (50 FR 47222, 47224 (Nov. 15, 1985)), following Natural Resources Defense Council I. Prior to that time, NRDC et al. point out, the regulation provided that awards would be limited to a person who "made a substantial contribution to a full and fair determination of the issues." 43 CFR 4.1294(b) (43 FR 34399 (Aug. 3, 1978)). NRDC et al. argue that the applicable standard for determining an award for work performed "through the merits decision" was the "substantial contribution" standard of the prior regulation and that under this regulation they are entitled to "full recovery," i.e., with no limitation on recovery based on the degree of success (Petition at 4, 5). NRDC et al. urge application of that standard but contend that, in any case, they are only seeking the requested award "in the interests of moderation." Id. at 5.

IBSMA; (3) pre-hearing, hearing, and post-hearing work before Judge Torbett; (4) work in connection with objections filed with the Board from Judge Torbett's recommended decision; (5) briefing of the Board regarding appropriate relief; (6) settlement negotiations; and (7) preparation of the fee petition (Petition at 6).

With the exception of work before Judge Torbett and in connection with objections to Judge Torbett's recommended decision filed with the Board, NRDC et al. contend that their legal work is fully compensable. In the excepted situations, NRDC et al. contend that the legal work is compensable in part and they set forth a percentage to be applied to the total number of hours worked in order to reflect work performed on successful claims and related unsuccessful claims. Based on this analysis, they determine the total number of compensable and noncompensable hours worked by their four attorneys, L. Thomas Galloway, Albert H. Meyerhoff, Lee L. Bishop, and Kent E. Hanson. See Petition at 22. 7/

Petitioners then set forth what they believe to be reasonable hourly rates for each attorney in accordance with the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation" as that standard is enunciated in Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984). See Petition at 23. These rates are supported by signed statements of the various attorneys setting out

7/ Summaries of time sheets detailing the amount of time spent by each attorney each day, the dates involved, and the nature of the work involved were attached either to the petition or a supplement to the petition.

their background and experience, affidavits of other practicing attorneys in the Washington, D.C., area, recent court awards of attorneys' fees and other evidence of prevailing rates. However, petitioners seek use of "current" hourly rates for computation of the lodestar amount.

By multiplying the total number of compensable hours worked per attorney and the reasonable hourly rate for each attorney, NRDC et al. arrive at what they consider to be the "lodestar" fee or the total amount of attorneys' fees for which they are entitled to an award, under the formula set out in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980), as adopted by IBSMA in Council of the Southern Mountains, Inc. v. OSMRE, 3 IBSMA 44, 53 (1981), vacated and remanded, Council of Southern Mountains, Inc. v. Watt, No. 82-45 (E.D. Ky. Oct. 18, 1982). 8/ See also Virginia Citizens for Better Reclamation, Virginia D. Hill, 88 IBLA 126 (1985). Petitioners' claimed "lodestar" fee is $360,914.80.

Finally, petitioners set forth those costs and expenses for which they seek an award, broken down by the nature of the cost or expense and the attorney for whom the cost or expense was incurred. 9/ The total amount

8/ NRDC et al. expressly do not seek an upward adjustment in the "lode-star" fee based on factors of delay in the award, contingency of the award, or quality of representation, pursuant to the Copeland formula, so long as "current hourly rates are awarded" (Petition at 3). However, in the absence of such an award, NRDC et al. assert their entitlement to such an upward adjustment. Id.

9/ These expenses include expenses for postage, photocopying, courier service, travel, secretarial overtime, and express mail service. The expenses incurred are supported by the statements of the various attorneys and attached breakdowns of the expenses by date, purpose, and amount, submitted with either the petition or a supplement to the petition.

of costs and expenses claimed in the Petition is $16,683.79. That total was adjusted by a supplement to the Petition filed on April 21, 1987, to $16,578.15.

In addition, NRDC et al. filed another supplement to the Petition on February 26, 1987, requesting an additional $13,166.94 for expenses incur-red for the services of an expert witness (Leonard Rice Consulting Water Engineers, Inc. (LRCWE)). 10/ Because this expense involved work before Judge Torbett, for which NRDC et al. is seeking only partial compensation, NRDC et al. applied the same percentage reduction used in calculating compensable hours to the total expense incurred, in order to arrive at the requested amount.

OSMRE, the State of Colorado, and West Elk have all submitted briefs in opposition to NRDC et al.'s Petition. In turn, NRDC et al. have filed a response to the objections of OSMRE and West Elk. The Petition and the briefs filed in opposition thereto have raised a number of issues which we will deal with seriatim.

II. APPLICABILITY OF SECTION 525(e) OF SMCRA TO PERMIT REVIEW PROCEEDINGS

[1] We must first address the argument raised by OSMRE which goes to the heart of NRDC et al.'s Petition. OSMRE contends that section 525(e),

---

10/ Attached to the supplement to the petition is the declaration of Leslie H. Botham, a professional engineer who was in charge of the work done by LRCWE on behalf of NRDC et al., confirming the expenses incurred by NRDC et al. as set forth on attached statements.

30 U.S.C. | 1275(e) (1982), was not intended by Congress to apply to permit review proceedings, but solely to "enforcement proceedings." OSMRE asserts that statutory provisions providing for attorneys' fees and expenses with respect to work before an agency are "waivers of sovereign immunity" and, thus, must be strictly construed (Opposition of OSMRE to Petition of NRDC et al. for Attorneys' Fees and Expenses (OSMRE Opposition) at 5). OSMRE recognizes that section 525(e) of SMCRA refers to "any administrative proceeding under this chapter," but contends that the legislative history of section 525 of SMCRA, the contemporaneous Departmental construction of section 525(e) of SMCRA, and the case of Utah International, Inc. v. Department of the Interior (Utah International), 643 F. Supp. 810 (D. Utah 1986), support its contention that section 525(e) of SMCRA does not apply to permit review proceedings.

We are convinced by the language of section 525(e) of SMCRA, the legislative history of that section, the implementing regulations at 43 CFR 4.1290 - 4.1295, and by the Utah International case that OSMRE's contention has no merit.

Section 525(e) of SMCRA, 30 U.S.C. | 1275(e) (1982), provides for an award of fees and expenses "[w]henever an order is issued under this section or as a result of any administrative proceeding under this chapter * * *." NRDC et al. assert that OSMRE's position is contrary to the plain wording of the statute. It appears that at one point in its brief in opposition OSMRE is arguing that section 525(e) awards must be limited to proceedings arising

under section 525 of SMCRA. 11/ That construction would effectively eliminate the phrase "as a result of any administrative proceeding under this chapter" from section 525(e).

The phrase "[w]henever an order is issued under this section" was intended to authorize awards where an order issued as a result of a section 525 proceeding. (Emphasis added.) The "section" referred to in subsection (e) is clearly section 525. However, after specifically providing for awards in section 525 proceedings, Congress extended the authority to grant awards where an "order" is issued "as a result of any administrative proceeding." There is no question that Congress intended to encompass more than section 525 enforcement proceedings within the bounds of section 525(e). 12/

The issue OSMRE raises is whether Congress intended to extend the coverage of section 525(e) to include permit review proceedings. OSMRE's

---

11/ It is not at all clear exactly to which "enforcement proceedings" OSMRE wants to limit section 525(e). At page 3 of its brief in opposition, it seems that it is arguing for a limitation to section 525 proceedings. Later, however, it cites a "contemporaneous and long-standing construction" of former Secretary of the Interior Cecil D. Andrus limiting the scope of section 525(e) to proceedings related to the "enforcement scheme" of SMCRA (OSMRE Opposition at 6). In a footnote to that statement in its brief, OSMRE explains that "[t]he proceedings involving the Act's enforcement scheme are adjudicatory proceedings. See 30 U.S.C. 1264; 1268(b); 1275(a)(2)." Id. at note 1. We fail to understand how this supports OSMRE's position, since 30 U.S.C. | 1264 (1982) is the statutory provision providing for the proceeding involved in this case--permit review.

12/ We need not determine for purposes of this case the breadth of that term. The proceeding giving rise to the attorneys' fee petition in this case is a permit review proceeding. We will limit our analysis to consideration of that proceeding.

position is that Congress did not. It cites various documents in the legislative history of SMCRA in support of that claim. 13/ A review of those documents does not evidence an intent either explicitly or implicitly to exclude permit review proceedings from the purview of section 525(e). At best, the legislative history supports a limitation of section 525(e) to adjudicatory proceedings. A permit review proceeding is, however, an adjudicatory proceeding. The legislative history does not support the limitation urged by OSMRE.

In further support of its position OSMRE cites the "contemporaneous and long-standing construction of section 525(e) in 1978 by the former Secretary of the Interior, Cecil D. Andrus," limiting section 525(e) to enforcement proceedings under SMCRA (OSMRE Opposition at 6). This is an apparent reference to the procedural regulations governing attorneys' fees awards, 43 CFR 4.1290 - 4.1295, adopted by the Department in 1978. However, OSMRE does not analyze the language of those regulations, perhaps because such analysis does not favor its position.

> The regulations provide at 43 CFR 4.1290:
>
> 4.1290 Who may file.
>
> (a) Any person may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a

13/ Those documents are S. Rep. No. 101, 94th Cong., 1st Sess. 57; H. Rep. No. 896, 94th Cong., 2d Sess. 79; S. Rep. No. 698, 94th Cong., 1st Sess. 4502; Mark-up Session on the Surface Mining Control and Reclamation Act
of 1977: Hearings on H.R. 2 Before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs, 95th Cong., 1st Sess. 295 (Mar. 28, 1977); and H.R. Rep. No. 218, 95th Cong., 1st Sess. 90, 130 (1977) (OSMRE Opposition at 8-11).

> result of that person's participation in any administrative proceeding under the Act which results in--
>
> (1) A final order being issued by an administrative law judge; or
>
> (2) A final order being issued by the Board. [Emphasis added.]

There is no attempt by this regulatory language to exclude from its scope permit review proceedings.

In the preamble to the 1978 final rulemaking, the Department rejected a comment that the types of proceedings in which attorneys' fees and expenses may be awarded be "broadened" to include rulemaking. 43 FR 34385 (Aug. 3, 1978). The Department stated: "These regulations [43 CFR 4.1290 - 4.1296] only govern surface mining hearings and appeals procedures under the Act, and, therefore, this comment was not accepted." 14/ Id. The Department did not state that the attorneys' fees regulations were limited only to enforcement proceedings; rather the limitation was to "hearings and appeals procedures under the Act." The regulations support the conclusion that section 525(e) encompasses permit review proceedings.

14/ This response completely undercuts OSMRE's position, set forth at page 7 of its opposition, that acceptance of the plain meaning of "any administrative proceeding" "means that every single administrative proceeding before the Office of Surface Mining or the Secretary of the Interior involving SMCRA has the potential for subjecting the government to attorney fees." OSMRE then lists, inter alia, rulemaking on the interim program, rulemaking on the permanent program, revisions to rules and petitions for rulemaking as examples of the types of proceedings for which awards could be made if NRDC et al.'s construction of section 525(e) is accepted. Obviously, OSMRE failed to realize that the Department had precluded such a construction in its 1978 rulemaking. Likewise, not even NRDC et al. urge such a broad construction in this case. They state that "[t]he Board need not decide the full reach of | 525(e) in resolving the instant dispute" (NRDC et al. Reply to Oppositions at 3 n.4).

Finally, OSMRE relies on Utah International, supra, to bolster its construction of section 525(e) as precluding awards in permit review proceedings. Utah International involved a petition for award of attorneys' fees and expenses, inter alia, pursuant to section 525(e), incurred in conjunction with a petition filed in 1979 seeking a declaration by the Secretary of the Interior, in accordance with section 522 of SMCRA, 30 U.S.C. | 1272 (1982), that certain lands abutting Bryce Canyon National Park and Dixie National Forest were unsuitable for surface coal mining operations. Following the Secretary's determination, certain lawsuits

were filed. The petitioners sought an award for participation in the administrative proceedings leading to the unsuitability determination and for their participation in the subsequent judicial proceedings.

The court concluded that under section 525(e) only a "party" may be assessed fees and expenses and because the Secretary was not a party to the unsuitability proceeding, the Government could not be liable for an award under section 525(e). 15/ 643 F. Supp. at 825. The court also stated: "The problems posed by an application of Section 525(e) to non-enforcement, non-adversarial proceedings convinces [sic] us that Section 525(e) was not intended to provide for awards in such proceedings." 643 F. Supp at 821.

The fact that the Utah International court used the word "non-enforcement" does not mean that it would support the interpretation pressed

15/ The unsuitability petition did not challenge any action by the Secretary or make the Secretary a party to the proceeding. The court identified the Secretary's role in the unsuitability process as "akin to factfinder, decisionmaker or legislator." 643 F. Supp at 825 (footnote omitted).

by OSMRE in this case. To the contrary, we have no doubt that were the Utah International court faced with the issue in this case--whether a permit review proceeding falls within the scope of section 525(e)--it would reach the same result that we have. Our basis for that conclusion is that OSMRE seeks to exclude from the scope of section 525(e) a proceeding (permit review) which the court expressly indicated was included. The court noted that the Department had limited section 525(e) to "proceedings related to the enforcement scheme of the Act." 643 F. Supp. at 824. In a footnote to that statement, citing 30 U.S.C. || 1264, 1268(b), and 1275(a)(2) (1982), the court stated that "proceedings involving the Act's enforcement scheme are also necessarily adjudicatory proceedings." 643 F.2d at 824 n.25. 30 U.S.C. | 1264 is the provision of SMCRA governing permit review. See note 11, supra.

As NRDC et al. point out, permit review proceedings involve the "permittee's compliance with statutory and regulatory requirements for permit issuance and the conditions under which the permittee would be allowed to operate consistent with the statutory enforcement scheme" (NRDC et al. Reply to Oppositions at 11 n.10). SMCRA is enforced not only by means of action taken by the regulatory authority after permit issuance, pursuant to section 521 of SMCRA, 30 U.S.C. | 1271 (1982), but also by means of determinations in the first instance whether to issue permits and under what terms and conditions, pursuant to section 514 of SMCRA, 30 U.S.C. | 1264 (1982).

Therefore, for the above-stated reasons we hold that section 525(e) of SMCRA applies to permit review proceedings.

III. ELIGIBILITY AND ENTITLEMENT FOR AWARD OF COSTS AND EXPENSES, INCLUDING ATTORNEYS' FEES

We turn to the question of whether petitioners are eligible for and entitled to receive an award of costs and expenses, including attorneys' fees, as a result of their initiation of and participation in the administrative review of West Elk's permit. The Secretary of the Interior has published regulations governing the awarding of attorneys' fees and expenses under SMCRA. 43 CFR 4.1290 - 4.1296. The regulation establishing the standards for such awards is 43 CFR 4.1294. The applicability of the various subsections of that regulation, however, is dependent upon whether OSMRE or West Elk (ARCO's successor in interest) or both would be liable for petitioners' attorneys' fees and expenses.

[2] NRDC et al. contend that both OSMRE and West Elk are "fully liable for all fees for which NRDC et al. is found entitled" (Petition at 2). NRDC et al. argue that by virtue of West Elk's intervention in the proceedings in defense of OSMRE's approval of the permit application, NRDC et al. prevailed against West Elk. NRDC et al., however, make no attempt to show how 43 CFR 4.1294 operates to authorize an award against West Elk in the proceedings in question.

43 CFR 4.1294 provides:

> Appropriate costs and expenses including attorneys' fees may be awarded--

> (a) To any person from the permittee, if--
>
> (1) The person initiates or participates in any administrative proceeding reviewing enforcement actions upon a finding that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed, and the administrative law judge or Board determines that the person made a substantial contribution to the full and fair determination of the issues, except that a contribution of a person who did not initiate a proceeding must be separate and distinct from the contribution made by a person initiating the proceeding; * * *.

That regulation requires that in order to recover an award from a permittee, inter alia, a petitioner must have initiated or participated in an administrative review proceeding "reviewing enforcement actions." In addition, as a result of that proceeding there must be a finding that the permittee violated the Act, regulation, or permit. 16/ The proceeding in this case was initiated by NRDC et al. to review the issuance of the permit. We have indicated, supra, that a permit review proceeding may be considered as part of the enforcement scheme of the Act; however, there is no doubt in this case that there was no finding that West Elk violated the Act, regulations, or permit. In Natural Resources Defense Council I, 89 IBLA at 71, 92 I.D. at 423, we found that each of the three deficiencies shown by NRDC et al. was due only to OSMRE failures. Since the Board made no finding that West Elk violated the Act, regulations, or permit, 43 CFR 4.1294(a)(1) is not applicable. Therefore, we conclude that no attorneys' fees or expenses may be awarded to NRDC et al. from West Elk. 17/

16/ Although that regulation does not explicitly require a finding that the permittee violated the Act, regulations, or permit, as correctly pointed out by West Elk, that requirement is implicit (West Elk Response at 27). In addition, there is no issue of an imminent hazard in this case; therefore, there is no need to discuss that alternative basis for an award.

17/ Such a conclusion is consistent with the position that it would be inequitable to require a party who has completely vindicated his position

NRDC et al. may receive an award from OSMRE, if it has satisfied the requirements of section 525(e) of SMCRA and 43 CFR 4.1294(b). Section 525(e) provides that the Secretary may make any award that he "deems proper." The regulations promulgated to implement that section provide at 43 CFR 4.1294(b) that attorneys' fees and expenses may be awarded from OSMRE to any person "who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues."

[3] Thus, the regulation incorporates two standards for one who initiates or participates in any proceeding under the Act. First, the person must show at least "some degree of success on the merits." This standard was added to the regulations, effective December 16, 1985, in order to conform the regulations to the standard established by the Supreme Court in Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983). See 50 FR 47223 (Nov. 15, 1985). This Board had actually recognized the applicability of that standard to proceedings covered by section 525(e) prior to the amendment of the regulation in our decision in Donald St. Clair, 84 IBLA 236, 92 I.D. 1 (1985).

---

fn. 17 (continued)
to pay the attorneys' fees of his opposition. Sierra Club v. Environmental Protection Agency, 769 F.2d 796, 801-02 (D.C. Cir. 1985). We note also that NRDC et al. have not sought an award from the State of Colorado, nor would the regulations support such an award.

The second standard is that the person make a "substantial contribution to a full and fair determination of the issues." In the 1985 rulemaking the Department had proposed deleting that standard from 43 CFR 4.1294(b). In restoring that requirement in the final rulemaking, the Department explained:

> In Carson-Truckee Water Conservancy District v. Secretary of the Interior, 748 F.2d 523, 526 (9th Cir. 1984), cert. denied sub nom. Pyramid Lake Paiute Tribe of Indians v. Carson-Truckee Water Conservancy District, ___ U.S. ___, 105 S. Ct. 2139 (1985), the court affirmed the denial of an award to a prevailing party and expressly rejected the contention that the Ruckelshaus decision had eliminated the requirement that a person make a "substantial contribution" to be eligible for an award. Furthermore, neither the proposed nor final rules have deleted the "substantial contribution" requirement for | 4.1294(a), and in consideration of concerns raised by comments concerning differing standards among the various subsections of | 4.1294, the "substantial contribution" requirement is restored to subsection (b) of the final rulemaking.

50 FR 47223 (Nov. 15, 1985).

The courts have indicated that there is a distinction between eligibility for an award and entitlement. Thus, the fact that a party is eligible for an award does not mandate entitlement. Carson-Truckee Water Conservancy District v. Secretary of the Interior, 748 F.2d at 526; Sierra Club v. Gorsuch, 672 F.2d 33, 38 n.8 (D.C. Cir. 1982); Utah International, 643 F. Supp. at 826. The "some degree of success on the merits" standard has been identified by the courts as the eligibility standard. Carson-Truckee, 748 F.2d at 526; Utah International, 643 F. Supp. at 826. Thus,

we must first consider whether petitioners achieved "some degree of success on the merits" in order to be eligible for an award. 18/

West Elk contends that NRDC et al. are not eligible for an award where they failed to achieve "at least some of the requested relief or some part of [the] declared objective" (Response of West Elk to the Petition (West Elk Response) at 12). West Elk argues that NRDC et al. achieved none of its declared objective, which was to have the permit vacated or denied, where the Board ultimately determined that no relief was appropriate. Id. at 14. West Elk characterizes the Board's holding that NRDC et al. might request a 30-day comment period on the sedimentation control plan for the loadout facility as a "trivial" success. Id. In the words of the State, "[n]oth-ing at the site has changed as a result of this proceeding" (Response of

the State of Colorado to the Petition for Award of Fees and Expenses (State Response) at 3).

[4] It is clear that West Elk construes the "some degree of success

on the merits" standard for eligibility as requiring a determination regarding whether a party has achieved its desired ultimate result. In Donald St. Clair, we stated that petitioners must demonstrate that they have

18/ In Carson-Truckee, 748 F.2d at 526, the court stated that:

"Ruckelshaus dealt only with eligibility for, not with entitlement to, a statutory award. * * * Nothing in Ruckelshaus suggests that the Court meant to reject the rule that, under the 'when appropriate' standard, an eligible party must make a substantial contribution to the goals of a statute to be entitled to attorney fees."

Both in our Donald St. Clair decision, supra, and in the quote from the preamble of the Nov. 15, 1985, rulemaking revising 43 CFR 4.1294, the words eligible and entitled have been used interchangeably. However, as stated, supra, the courts have drawn a distinction between those terms.

achieved "some of the benefit they sought in bringing this action before the Department." Donald St. Clair, supra at 250, 92 I.D. at 9.

In Utah International, the court found that no award could be made pursuant to section 525(e) of SMCRA for work done in conjunction with the unsuitability petition; however, it did discuss the eligibility standard with regard to proceedings before the court and concluded that the petitioners had achieved some degree of success on the merits. 643 F. Supp. at 826. The court's decision in Utah International establishes that some degree of success on the merits is not measured by whether a party succeeds with respect to every claim or at every stage of a proceeding, but whether it succeeds on some claim or at some stage.

Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 543 F. Supp. 126 (E.D. Va. 1982), involved a request for attorneys' fees arising from a suit by a group of clinical psychologists seeking injunctive relief to overturn Blue Shield's policy of requiring clinical psychologists to bill through a licensed physician. Following a Fourth Circuit decision upholding the plaintiffs' claims, and denial of certiorari by the United States Supreme Court, the district court entered judgment in favor of plaintiffs. That order was modified subsequently when the need for prospective injunctive relief was no longer necessary because the Virginia Supreme Court upheld the constitutionality of a Virginia statute requiring the Blue Shield plans to reimburse clinical psychologists directly. Thus, the court merely required the defendants to notify practicing clinical psychologists of the Fourth Circuit's decision and to retain certain records. Nevertheless, the

court concluded that plaintiffs had "substantially prevailed" within the meaning of the standard for an award of attorneys' fees and expenses under the relevant Federal statute (15 U.S.C. | 26 (1982)). As the court stated: "The minimal relief ultimately required by circumstances in no way detracts from plaintiffs' accomplishments in this litigation." 543 F. Supp. at 130; see also Copeland v. Marshall, 641 F.2d at 904-05, and cases cited therein.

Likewise, in the present case, NRDC et al.'s failure to obtain any of their desired ultimate relief against OSMRE should not detract from their "accomplishments" in this proceeding, as discussed infra. It is clear that this failure is attributable to circumstances which occurred during the pendency of the proceedings, i.e., the efforts of the State in preparing a PCI assessment and AVF determination in connection with revisions of West Elk's permit and mine plan and the submission and approval of a sedimentation control plan after permit issuance.

Therefore, we conclude that the ultimate relief granted in a partic-ular case is not the only factor which determines whether the petitioner

has achieved "some degree of success on the merits." In Natural Resources Defense Council I, we concluded that OSMRE failed, prior to approving West Elk's permit, to conduct an adequate PCI assessment; to make its AVF determination; and to require a sedimentation control plan for the loadout facility. These conclusions confirmed, at least in part, the charge made by NRDC et al. in their original petition for review that OSMRE had improperly approved ARCO's permit. In view of this partial vindication of its position, we must conclude that the petitioners achieved "at least some degree

of success on the merits," regardless of whether they failed to succeed on their other charges or to obtain that relief which they regarded as appropriate. By focusing only on whether NRDC et al. achieved the desired ultimate result, West Elk has overlooked the success which NRDC et al. did achieve. NRDC et al. must be regarded as eligible for an award of costs

and expenses, including attorneys' fees, under section 525(e) of SMCRA.

Although petitioners achieved some degree of success on the merits and are, thus, eligible for an award of attorneys' fees and expenses, an award does not automatically follow. The regulations require that we must further determine whether petitioners are entitled to an award--i.e., whether they made a substantial contribution to a full and fair determination of the issues.

West Elk argues that NRDC et al. failed to make a "substantial contribution to the goals of SMCRA" and, for that reason, are not entitled to an award (West Elk Response at 10 n.5). It argues, in the alternative, that even if NRDC et al. made a contribution to the goals of SMCRA, that contribution was not substantial.

The regulatory test is whether the petitioners made a substantial contribution to a full and fair determination of the issues. The substantive issues in this case were raised by petitioners. Those issues, along with certain procedural issues, were exhaustively litigated before Administrative Law Judge Torbett and this Board. NRDC et al.'s petition for review of the permit represented the first challenge to a permit issued by

OSMRE under SMCRA. The issues presented were issues of first impression under that Act. There can be no dispute that petitioners' efforts resulted in a full and fair determination of those issues. NRDC et al. contributed to the resolution of all those issues, and we find that their contribution was substantial. Therefore, we conclude that petitioners are both eligible for and entitled to an award of costs and expenses, including attorneys' fees.

IV. CLAIMS FOR WHICH PETITIONERS ARE ENTITLED TO AN AWARD

[5] Having determined that petitioners are entitled to an award in this case, we must examine the difficult question of what issues are compensable. That involves the task of evaluating the "degree of success obtained" by petitioner. Hensley v. Eckerhart, 461 U.S. at 436. The inquiry requires the identification of successful claims and those claims sufficiently related to the successful ones to warrant an award for time spent thereon. Utah International, 643 F. Supp. at 826. Unsuccessful claims unrelated to successful ones should not be compensated. Id. As

the Court stated in Hensley, 461 U.S. at 435, "unrelated [unsuccessful] claims [should] be treated as if they had been raised in separate lawsuits." See also Sierra Club v. Environmental Protection Agency, 769 F.2d at 801-02. Thus, we undertake an issue-by-issue analysis to identify those three categories of claims: successful, unsuccessful related, and unsuccessful unrelated.

First, there is no question petitioners obtained the requisite degree of success for three claims. Those three successful claims were (1) the failure of OSMRE to assess the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance, (2) the failure of OSMRE to make its AVF determination prior to permit issuance, and (3) the failure of OSMRE to require plans for the loadout sedimentation pond prior to permit approval. 19/

Petitioners assert that an award should also be made for certain unsuccessful claims related to their successful PCI assessment claim. They identify those claims by referring to the sections of Natural Resources Defense Council I discussing those claims. They are as follows: III. All Anticipated Mining; IV. Identification of Ground Water Basin; V. Control Watershed; and VI. Development of Information for Assessment of the Probable Cumulative Impact. 89 IBLA at 11-28, 92 I.D. at 394-403. West Elk challenges that assertion, arguing that they are clearly distinct issues and that petitioners treated them as such in their briefs, as did the Board in its decision.

19/ OSMRE concedes such success, but contends that NRDC et al. are not entitled to recover with respect to the "loadout facility issue" because
the Board "awarded relief against the State of Colorado, not against OSMRE" (OSMRE Opposition at 18). OSMRE, however, overlooks the fact that the success NRDC et al. achieved with respect to this issue was again not the ultimate relief obtained, whether against OSMRE or the State, but the Board's declaration that OSMRE had failed to require the appropriate information prior to permit issuance. Thus, NRDC et al. are entitled to an award of attorneys' fees and expenses for work performed with respect to the "load-out facility issue," as well as the AVF issue.

NRDC et al. contend that the following language from Hensley v. Eckerhart requires compensation for all the related PCI assessment issues: "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." 461 U.S. at 435. They argue that they raised several alternative grounds in attacking the PCI assessment and sought a ruling that it was performed in violation of section 510(b)(3) of the Act, 30 U.S.C. | 1260(b)(3) (1982), and that the Board, in fact, ruled that the PCI assessment did not satisfy the requirements of the Act.

We find no trouble in accepting petitioners' assertion that all the PCI assessment issues are related. As instructed by the court in American Academy of Pediatrics v. Heckler, 580 F. Supp. 436, 439 (D.D.C. 1984) (quoting from Hensley v. Eckerhart, 461 U.S. at 435), claims will be considered related where they were "integrally related to the central issue, 'involved a common core of facts' and were 'based on related legal theories.'" On the other hand, claims are not considered related where they are based on "different policy rationales and statutory provisions," even though they may arise from the same set of regulations and the same administrative record. Sierra Club v. Environmental Protection Agency, 769 F.2d at 803.

In Natural Resources Defense Council I, we stated under section III. All Anticipated Mining that "NRDC et al. set forth numerous objections focusing on the statutory requirements of section 510(b) of SMCRA, 30 U.S.C. | 1260(b) (1982)." 89 IBLA at ll, 92 I.D. at 394 (emphasis added). After

quoting section 510(b)(3) of the Act, we stated "[p]etitioners' first charge is that OSM did not consider 'all anticipated mining' in its assessment of the probable cumulative impact (PCI)." Id. (emphasis added).

Sections IV, V, and VI of our decision also addressed issues raised by NRDC et al. related to perceived deficiencies in OSMRE's PCI assessment. Thus, all those assertions by NRDC et al. were integrally related to a central issue (the adequacy of the PCI assessment), involved a common core of facts (OSMRE's preparation of that assessment), and were based on related legal theories. The legal theories advanced by petitioners were related in the sense that each focused on various aspects of section 510(b)(3) of SMCRA and its implementing regulations. The intention of each theory was to show the inadequacy of OSMRE's PCI assessment.

West Elk argues that, even if unsuccessful claims are deemed to be related to successful claims, NRDC et al. are not entitled to recover with respect to such unsuccessful claims because such an award would not bear a reasonable relation to the results obtained. West Elk notes that the only relief NRDC et al. obtained was the "right to request a comment period on the sedimentation pond" (West Elk Response at 18-19). We agree with West Elk that the results obtained are a standard by which to judge whether to allow recovery with respect to related, unsuccessful claims. See Hensley v. Eckerhart, 461 U.S. at 440; Illinois Welfare Rights Organization v. Miller, 723 F.2d 564, 567 (7th Cir. 1983). However, as discussed supra, the ultimate relief afforded in this case is not the primary focus in judging the results obtained. NRDC et al. did succeed in establishing that OSMRE's PCI

assessment was inadequate. That the Board ultimately denied any relief for that failure is directly related to circumstances which unfolded during the pendency of the proceedings and should not detract from any award which might otherwise be available to NRDC et al.

We find that NRDC et al. may receive an award for its unsuccessful claims related to the challenge to OSMRE's PCI assessment. All other substantive issues raised by NRDC et al. must be considered unrelated, unsuccessful claims and, therefore, not compensable.

V. HOURS REASONABLY EXPENDED ON QUALIFYING WORK

[6] We must now review the work done by counsel for petitioners in this case in relation to the qualifying issues in order to determine what work is compensable. 20/ This entails an examination of the number of

hours reasonably expended on qualifying work. That figure is then multiplied by a reasonable hourly rate in order to arrive at what is known as the "lodestar." Hensley v. Eckerhart, 461 U.S. at 433; Copeland v. Marshall, 641 F.2d at 891. A strong presumption exists that the lodestar represents the reasonable fee to which counsel is entitled. Blum v. Stenson, 465 U.S. at 897; Utah International, 643 F. Supp. at 828. We examine first the hours requested for the seven categories of work. 21/

20/ Documents submitted by petitioners' attorneys indicate that at the time of their participation in the proceedings Galloway, Bishop, and Hanson were engaged in the private practice of law, while Meyerhoff was affiliated with NRDC.

21/ West Elk objects to the fact that only Bishop's statement is in affidavit form, as required by 43 CFR 4.1292(a)(1), and contends that the petition should be "stricken" as insufficient, except as to Bishop (West Elk Response

A. Preliminary Work

[7] Petitioners assert that all the time expended in the preparation and filing of the petition for review in this case is compensable. They claim a total of 189.55 hours expended in June 1981 - August 1981 by three attorneys (Galloway-27.25 hours; Bishop-20.00 hours; and Hanson-142.30 hours) with respect to preliminary work. They state that the work for

which compensation is sought involved discussions with clients, familiarization with the record made before OSMRE, analysis of the permit and supporting documentation, identification of issues, and preparation and filing of pleadings. NRDC et al. contend that "[a]lmost all of this work,

---

fn. 21 (continued)
at 37). The cited regulation requires that a petition be supported by an "affidavit setting forth in detail all costs and expenses including attorneys' fees reasonably incurred for, or in connection with, the person's participation in the proceeding." 43 CFR 4.1292(a)(1). The signed statements of Galloway, Hanson, and Meyerhoff are technically not affidavits. Nevertheless, they are signed and indicate that they are declarations made "under penalty of perjury." In addition, the signatories are subject to
the strictures of 18 U.S.C. | 1001 (1982). We find the signed statements acceptable under the regulation.

West Elk also contends that a supplementary affidavit of Bishop submitted Feb. 26, 1987, should be stricken as "untimely" (West Elk Response
at 37). The regulations require the submission of a petition within 45 days of receipt of a final order by the Board and the submission of an affidavit detailing costs and expenses "in support of the petition." 43 CFR 4.1292(a). The regulation does not bar supplementary affidavits. In the absence of prejudice to other parties in this case, the supplementary affidavit is accepted.

West Elk further objects to NRDC et al.'s submission of prepared time records, rather than the actual contemporaneous time records (West Elk Response at 37). However, we are satisfied by the assertions in the attorneys' signed statements that the submitted records accurately reflect the actual records. This is sufficient to constitute "evidence concerning the hours expended on the case," as required by 43 CFR 4.1291(a)(3). See Copeland v. Marshall, 641 F.2d at 905. The circuit court in Ramos v. Lamm, 713 F.2d 546, 553 (10th Cir. 1983), concluded that contemporaneous time records must be submitted to a district court only "upon request." The Department has made no such request in 43 CFR 4.1292(a)(3). Further, petitioners were not required to submit evidence regarding all of the hours expended on the case.

* * * would have been necessary even if NRDC et al. had raised only those issues on which it ultimately prevailed" (Petition at 8-9).

West Elk strongly objects to the claim for preliminary work. It charges that NRDC et al. should not be compensated for taking a "shotgun approach" and that they should have concentrated their efforts from the beginning on issues on which they had some reasonable prospect of prevail-ing (West Elk Response at 41). West Elk also asserts that much of the time claimed by petitioners appears to be for an earlier proceeding. That proceeding, West Elk points out, was a challenge by petitioners to the State permit for the Mt. Gunnison No. 1 Mine before the Colorado Mined Land Reclamation Board (CMLRB), which was decided adversely to petitioners and appealed by them to the State court where the action was dismissed on November 29, 1981 (West Elk Response to Petitioners' Supplemental Submis-sion at 3). West Elk objects to any recovery for work performed in connection with the State proceeding.

The time records submitted by petitioners in support of their petition show that during the months of June, July, and August 1981 the attorneys Galloway, Bishop, and Hanson each recorded more than the total hours claimed per attorney. No attempt has been made to equate which of the entries on the time records were utilized to arrive at the totals for each attorney. Petitioners merely state that 189.55 hours were reasonably expended; however, as correctly pointed out by West Elk, many of the entries for those 3 months are not sufficiently detailed to determine whether or not they relate to the filing of the petition or reflect actions taken in or in

preparation for proceedings involving the State of Colorado (West Elk Response, Attachments E and F; West Elk Response to Petitioners' Supplemental Submission at 3-5).

In response to West Elk's concerns, NRDC et al. have not clarified any of the entries; however, they do argue that work performed in related State proceedings is reasonably related to the work in this case and therefore compensable. In support of that assertion they cite Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546 (1986). In that case the Court held that work performed by counsel for the citizens' group during administrative proceedings seeking to enforce a consent decree requiring the State to implement a vehicle inspection and maintenance program was properly compensable as a cost of litigation under section 304(d) of the Clean Air Act, 42 U.S.C. | 7604(d) (1982), even though it did not occur in the context of judicial litigation.

We find the cited case distinguishable from the present situation. Here, petitioners were not involved in some post-judgment monitoring of a consent decree. The State actions initiated by petitioners were not related to the Federal proceedings under consideration. Although the State proceedings involved the same minesite and a related State permitting process, there is no indication that petitioners were required to pursue any State action in order to preserve any rights to initiate the challenge to the permit which was involved herein. We find that any entries related to work performed in or in preparation for State proceedings do not represent hours reasonably expended on qualifying work.

Therefore, petitioners' request of 189.55 hours for preliminary work is not justified. However, the regulations at 43 CFR 4.1295(a) provide that an award under SMCRA may include costs and expenses incurred "as a result of initiation" of a proceeding under the Act. "Initiation" in this case involved counsels' time familiarizing themselves with the case and preparing the petition for review. Thus, some number of hours of preliminary work will be considered as reasonably expended; the question is how many? Our only recourse is to review the time records of each of the three attorneys for the time period in question--from June 1981 up to and including the filing of the petition with IBSMA on August 11, 1981.

Galloway's time records show 3 hours in June 1981. Three entries refer to calls to or from "client" or "Carolyn Johnson" concerning "case." The fourth entry shows 2.25 hours for "Review documents in recent application." Since counsel may have been involved in activities related to proceedings before the State of Colorado at that time, the lack of specificity as to what "case" is being referred to, as well as the fact that the "application" is not identified, leads to the conclusion that none of the hours were reasonably expended with regard to the Federal proceedings.

The July 1981 time records for Galloway list 18 hours. The same deficiencies obtain for most of the July entries--"clients" and "case" are not further defined and certain entries clearly refer to State proceedings. We find 4.25 hours to have been work on qualifying proceedings (1.50 hours on July 14; 0.75 hour on July 15; 1 hour on July 16; 0.50 hour on July 21; and 0.50 hour on July 27).

Three entries totalling 7.75 hours are included in Galloway's time records for August 1981--on or prior to the filing of the petition on August 11, 1981. The first entry relates to an "appeal." Since no Federal proceeding had been initiated, the reference to "appeal" must have been to a State proceeding. The other two entries totalling 6.50 hours refer to the drafting and editing of the petition for review. We find that Galloway expended a total of 10.75 hours for preliminary work on qualifying proceedings.

Bishop's time records for the period up to and including August 11, 1981, show 23 hours. Petitioners have claimed 20 hours for Bishop for preliminary work, but have not identified which 20 hours. We will review all 23 hours. Of the 2.5 hours recorded in July 1981, not all were involved with development of the Federal case. We find that half of the 2.5 hours were expended for preliminary work on qualifying proceedings.

Much of Bishop's work in August 1981 involved reviewing OSMRE docu-ments and the Federal permit. That time was expended on qualifying work. However, the entries for August 10, 11, and 12 refer to a request for hearing. The August 12 entry states "continue preparing request for hearing". NRDC et al. filed the petition for review in this case on August 11. We find the August 10, 11, and 12 hours are not compensable. The hours expended by Bishop in August 1981 are 17.50. The total hours expended by Bishop for preliminary work on qualifying proceedings are 18.75.

Hanson's time records for the preliminary period reveal time devoted almost exclusively to State proceedings. As we have stated, there may be no

recovery for those hours. To the extent that any of his time may have been devoted to the proceedings in question, it is not specifically reflected in the time records. We find none of the hours claimed by Hanson for preliminary work to have been reasonably expended for qualifying work.

While we find that Galloway and Bishop devoted 29.50 hours to preliminary work on qualifying proceedings, due to petitioners limited success in this case we must reduce the hours accordingly. We conclude that counsel for NRDC et al. reasonably expended a total of 11.80 hours of their qualifying preliminary work time on compensable claims. Our conclusion is based on an application of the percentage for substantive issues (40 percent) which we calculate under the heading Section V. C. Work Before the Administrative Law Judge, infra. We resort to that percentage in the absence of another reasonable method for gauging the amount of hours devoted to compensable preliminary work, since the actual petition for review filed by NRDC et al. was a brief 5-page recitation of their claims.

B. Procedural Matters Before IBSMA

[8] Petitioners claim 568.95 hours were reasonably expended on procedural matters before IBSMA between August 1981 and February 1982. They assert that they are entitled to an award based on work with regard to such matters because it was "absolutely necessary in order to prosecute the substantive issues on which NRDC et al. ultimately prevailed" (Petition at 12).

As a general matter, absent success on the merits, a party is not entitled to an award of attorneys' fees and expenses "for purely procedural

victories." Utah International, 643 F. Supp. at 828 (citing Hanrahan v. Hampton, 446 U.S. 754, 757-59 (1980)). However, as the court concluded in Utah International, a party who has achieved a substantive victory is also entitled to an award "for the procedural victories which contributed to the ultimate success." Id.

Petitioners allege that "the Respondent (OSMRE) and both intervenors filed extensive motions to dismiss" and that since NRDC et al. prevailed on all issues raised and because work on the procedural issues was absolutely necessary in order to prosecute the substantive issues, "it is beyond cavil that all the work before the Board [IBSMA] on the motions to dismiss is compensable" (Petition at 12). Despite this claim by petitioners, it is clear that they seek compensation for all work done on all procedural matters, not just for the motions to dismiss. As pointed out by West Elk, petitioners also desire compensation for such things as a motion for temporary relief and memorandum in support thereof, which motion was not pursued by petitioners nor granted by IBSMA.

Although counsel for NRDC et al. did extensive procedural work, it is not all compensable. First, to the extent NRDC et al. achieved "procedural victories" against ARCO (West Elk's predecessor in interest) and the State in thwarting ARCO's motion to dismiss, which was joined in by the State, they are not entitled to an award from OSMRE. See Natural Resources Defense Council v. Administrator, Environmental Protection Agency, 595 F. Supp. 65, 70 n.1 (D.D.C. 1984); cf. Avoyelles Sportsmens' League v. Marsh, 786 F.2d

631 (5th Cir. 1986) (Federal statute authorizing awards against the Government when "appropriate" precludes an award for phases of the litigation where party seeking the award was opposed only by parties other than the Government). As we have held supra, neither West Elk nor the State of Colorado are liable for attorneys' fees and expenses under the regulations. While OSMRE is liable for some fees and expenses, its motion to dismiss was simply a two-page motion requesting dismissal based upon an alleged failure properly to serve the petition for review. NRDC et al. filed a response to that motion, and IBSMA denied the motion without discussion as part of an order dated December 9, 1981.

Second, NRDC et al. filed numerous documents with IBSMA prior to that Board's February 1982 order, including the motion for temporary relief and memorandum in support thereof. In addition, petitioners' counsel participated in oral argument before IBSMA; however, as IBSMA stated in its February 24, 1982, order, it granted "the ARCO/Colorado motion for oral argument concerning their motion to dismiss." 4 IBSMA at 6. Thus, the ARCO motion to dismiss was the principal focus of the oral argument. The hours listed in support of these activities are compensable only to the extent they may be related to the success petitioners achieved in this case.

Petitioners assert that they are entitled to the following hours for their counsel: 298.25 hours for Galloway; 230.00 hours for Bishop; and 40.70 hours for Hanson. However, the time sheets for those attorneys from August 12, 1981 (the day following the filing of the petition for review), to and including February 24, 1982 (the date of IBSMA's order referring the

case for a hearing), show a total of 443.75 hours for Galloway, 270.00 hours for Bishop, and 164.80 hours for Hanson. Petitioners have not shown what hours of those totals they utilized to arrive at the number of hours claimed for procedural matters before IBSMA, nor have they attempted to categorize the hours claimed so as to relate them to specific tasks, such as particularizing the various motions worked on or other tasks undertaken. Clearly, some of the hours listed during that period were spent on unsuccessful settlement negotiations which petitioners have designated as a separate category of work (see, e.g., Galloway entries for October 15, 16, and 18, 1981, etc.); however, petitioners have left us to guess what entries support their totals for the procedural category.

Our recourse is to review the time sheets of each of the attorneys for the period from August 12, 1981, to February 24, 1982, based on our conclusions about what is compensable work, and determine the number of hours reasonably expended on procedural matters before IBSMA. Our review leads us to the conclusion that a total of 88.05 hours were spent on compensable procedural matters before IBSMA. (See Appendix A for the totals for each attorney.)

C. Work Before the Administrative Law Judge

[9] Petitioners assert that their counsel expended 1,849.10 hours between February 25 and September 17, 1982, on work before Administrative Law Judge Torbett (Galloway-755.50 hours; Meyerhoff-168.80 hours; Bishop-608.50 hours; and Hanson-316.30 hours). Petitioners identify the work as

involving "extensive discovery, numerous depositions, pre-trial hearings and a minesite visit, preparation of experts, preparation for cross-examination of the opponents' experts, an extensive hearing, and hundreds upon hundreds of pages of post and pre-trial briefing and findings of fact and conclusions of law" (Petition at 14). Of this work, petitioners estimate that "approximately 25%" of the hours was devoted to procedural issues which they contend are fully compensable because it was necessary to address those in order to reach the substantive issues. The procedural work before Judge Torbett is identified as "standing depositions, interrogatories, preparation of depositions, pre-trial and post-trial briefing on procedural issues and so forth" (Petition at 15).

For the substantive issues, petitioners assert they are entitled to 44 percent of the total time expended. They arrive at this percentage by engaging in a page-counting exercise. They assert that "[a]s far as substantive issues are concerned, if one weighs the issues won by the pages devoted to the issue before the ALJ, Petitioners prevailed on issues which consumed 66 pages of 150 total pages or 44% of the total time expended" (Petition at 15). The page-counting method is a fair method of allocating time, petitioners argue. They contend it is the method adopted by the

court in In re: Surface Mining Regulation Litigation II, No. 79-1144

(D.D.C. Aug. 1, 1985), in which some issues were won and some were lost. Petitioners conclude that they are entitled to 69 percent of the time expended before Judge Torbett (25 percent for procedural issues plus 44 percent for substantive issues) or 1,275.90 hours. Applying the 69-percent figure to the total hours expended per attorney, the following

hours claimed are derived: Galloway--521.30 hours; Meyerhoff--116.50 hours; Bishop--419.85 hours; Hanson--218.25 hours.

West Elk strenuously objects to petitioners' methodology in deter-mining the hours reasonably expended before Judge Torbett. It argues

that petitioners do not disclose the basis for their 25-percent procedural estimate. This point is well taken. Although petitioners estimate that 25 percent of their attorneys' time was devoted to procedural issues, they have made no attempt to provide the Board with any breakdown of the time records to support such an estimate. Petitioners must have had some basis for the estimate, yet they have not shared it with the parties or this Board. West Elk characterizes petitioners' claim of 462 hours for procedural issues as an "outrageous assertion" (West Elk Response at 44).

The vagueness of petitioners' claim precludes any award for procedural matters. The party seeking compensation must bear the burden of providing sufficient details to tie its time records to the amount claimed. Petitioners have failed to do that.

Moreover, the procedural issues addressed by Judge Torbett in his recommended decision are found in Part II of that decision on pages 5-7 under the heading PROCEDURAL RULES, STANDARD OF PROOF AND REVIEW. None of the issues discussed therein was dispositive, and it does not appear that work on those issues was absolutely necessary in order to prosecute the substantive issues upon which petitioners ultimately prevailed. Although Judge Torbett also addressed standing in his decision, he stated that he was

bound by IBSMA's ruling in that regard "and that Petitioners have standing unless the proof shows the allegations contained in their affidavits filed before the Board are 'groundless in fact.' On this basis, there is no question in the mind of the undersigned that the Petitioners have standing to maintain this action" (Recommended Decision at 60).

Petitioners' claim for "approximately" 25 percent of its attorneys' hours before Judge Torbett for procedural issues must be rejected.

West Elk, OSMRE, and the State all object to the page-counting method utilized by petitioners to determine hours expended on substantive issues. OSMRE contends that this method will not accurately reflect the amount of time reasonably expended on successful issues, but rather the "petitioners' determination of the weight or space to be accorded a particular argument" (OSMRE Opposition at 15). The State and West Elk argue that the method will encourage lengthy submissions with respect to issues on which a party has a good chance of prevailing (State Response at 4; West Elk Response at 44). The courts have eschewed a "'mathematical approach'" to fee calculation, West Elk asserts, citing Ramos v. Lamm, 713 F.2d at 556 n.7 (quoting from Hensley v. Eckerhart, 461 U.S. at 435 n.11).

Although West Elk is correct that Hensley disapproved of a mathemat-ical approach, it was not the page-counting method espoused by petitioners. In general, the Supreme Court in Hensley rejected use of a mathematical approach to determine the degree of success achieved by a prevailing party as an aid to determining a reasonable fee, not as a method to determine the

number of hours reasonably expended on successful issues. A comparison of total issues to those prevailed upon would not give weight to the relative significance of issues. For example, if a case presented 10 issues and the party seeking attorneys' fees prevailed on only one of them, a pure mathematical approach would dictate that the party was only 10 percent successful, regardless of the relative importance of the issues.

The page-counting method was adopted by the district court in In re: Surface Mining Regulation Litigation II, No. 79-1144 (D.D.C. Aug. 1, 1985), which involved an award under the Equal Access to Justice Act, 28 U.S.C. | 2412 (1982). The court reduced the total hours claimed by 21 percent on the basis that the petitioners had lost issues which had consumed 21 percent of their brief to the court. OSMRE seeks to discredit petitioners' reliance on the district court opinion by stating "[t]he present case, however, can hardly be compared to the In Re case which involved much more complex issues than the ones in this case * * *" (OSMRE Response at 15 n.4). We fail to see any basis for the attempted distinction by OSMRE. Moreover, OSMRE has not proposed any alternative approach to determining time spent on successful issues, nor has West Elk, although West Elk has engaged in its own percentage-page method. West Elk analyzed petitioners' major pleadings, Judge Torbett's decision, and the Board's decision to determine the number of pages devoted in each of those documents to the substantive deficiencies identified by the Board. West Elk concludes that petitioners are entitled to only approximately 16 percent of the time spent on those substantive issues (West Elk Response at 44-45 and Attachment C thereto). West Elk did

not, however, include in its estimate those pages devoted to related unsuccessful claims, which we have held are compensable.

We find that in this particular case the page-counting method provides a useful means to determine the number of hours devoted to particular issues. Nevertheless, we recognize the deficiencies inherent in such a method. The number of pages devoted to an issue may not accurately reflect the amount of work involved in producing the product. Counsel may be completely familiar with certain issues and the number of pages in a brief may not at all reflect the hours necessary for its preparation. In addition, it could encourage a party to include all its research on a particular issue in its brief, regardless of the relevance. Although we expressly decline to adopt the page-counting method for all cases, we will employ the page counting method in this case to determine the hours reasonably expended before Judge Torbett.

Petitioners claim that they "prevailed on issues which consumed 66 pages of 150 total pages or 44% of the total time expended" (Petition at 15). West Elk correctly points out that petitioners do not specifically identify the document from which they derive their page count. Apparently, the document in question is petitioners' initial brief, dated August 2, 1982. That document contains 148 pages plus 14 separately numbered pages of findings of fact. For our purposes, we will consider the 148 pages. The three areas for which petitioners may receive credit for hours expended are the PCI assessment, AVF issue, and the loadout facility. There are 44, 6, and 1 pages in the brief related to those issues, respectively, for a total

of 51 pages (pages 5-48, 103-108, and 109). Although petitioners claim 66 pages, they inexplicably do not identify which 66 pages, and thus, we will not speculate how they arrived at that total.

Our examination of that brief also reveals that Part III thereof, from pages 127-147 or 21 pages, was devoted to procedural issues. 22/ Since we are concerned with hours expended on substantive issues, we will subtract those 21 pages from the total 148 pages of the brief to arrive at the proper page total for determining the percentage for substantive issues. Therefore, we find the pages devoted to compensable substantive issues are 51 of the adjusted total of 127 or 40 percent.

We also find, however, that the percentage derived for substantive issues from the page-counting method cannot, as asserted by petitioners,

be applied directly to the total number of hours expended by petitioners' counsel. The following analysis must be invoked. Petitioners assert that 25 percent of the total time expended was for procedural matters. We have determined that the time claimed for procedural matters before Judge Torbett is not compensable. Therefore, we must subtract 25 percent of the total hours in order to derive the proper total to which the substantive issue percentage will apply. The adjusted total time expended is 1,386.80 hours (1,849.10 hours minus 25 percent of 1,849.10 hours). The total number of hours reasonably expended on work before Judge Torbett is 40 percent of 1,386.80 hours or 554.80 hours.

22/ Petitioners do not state why the page-counting method was not presented as a way to measure the hours for procedural issues. However, we note that 21 pages of a total of 148 pages is 14 percent, and thus, less than the "approximately" 25 percent claimed by petitioners.

D. Initial Work Before the Board

Petitioners contend that their counsel expended 98.85 hours (87.75 by Galloway and 11.10 by Hanson) in work before the Board leading to the issuance of the Board's September 27, 1985, decision. They assert that "[b]ased on the pages devoted to issues on which Petitioners prevailed (64 of 136), Petitioners are entitled to compensation for 47% of the time expended before the Board" or 41.25 hours for Galloway and 5.22 hours for Hanson (Petition at 17, footnote omitted). Although petitioners do not so state, the document upon which they base their claim is their 138-page brief to the Board in which they set forth their objections to Judge Torbett's recommended decision. Petitioners do not disclose which 64 pages of that document they rely on to arrive at their 47-percent figure. West Elk argues that under its analysis NRDC et al. devoted only 21 pages of its brief to successful issues. Our own page counting results in the following conclu-sions: 48 pages for the PCI assessment issues, 7 pages for the AVF issue, and 2 pages for the loadout facility for a total of 57 pages of the 138 (pages 6-53, 105-11, and 112-13, respectively). That page count represents approximately 41 percent of the time spent on initial work before the Board. Accordingly, we conclude that petitioners are entitled to recover for 40.50 hours of work before the Board.

E. Briefing the Board on Relief

NRDC et al. claim that their attorneys expended 68.50 hours (63.50 by Galloway and 5.00 by Meyerhoff) in briefing the Board on the relief issues

and that 100 percent of those hours are compensable. Petitioners argue that 68.50 hours is "plainly reasonable for the work product produced" and that "it was only through the use of experienced attorneys that the hours expended on the work were kept so modest" (Petition at 18). They contend that, despite the fact that the Board did not accept the relief requested, they prevailed on the merits of the issues addressed, and, therefore, are entitled to compensation for all the work done on the relief issues.

We agree that petitioners are entitled to compensation for the hours reasonably expended in briefing the Board on relief, and we conclude after reviewing the time sheets of Galloway and Meyerhoff for the relevant time period (from issuance of the Board decision on September 27, 1985, until the filing of petitioners' reply brief on January 6, 1986) that the hours claimed were reasonably expended and that petitioners are entitled to all 68.50 hours claimed.

F. Settlement Discussions

[10] Petitioners seek compensation for 279.25 hours allegedly expended in unsuccessful settlement negotiations pursued in the fall of 1981 and the summer of 1982. They state that they entered into settlement discussions in good faith and expended considerable resources in pursuing settlement. Compensation is justified, they assert, so long as the total time expended was reasonable. West Elk believes that the hours claimed by petitioners are clearly unreasonable and challenges them to substantiate their claim.

While some of petitioners' time record entries clearly relate to settlement discussions, petitioners make no attempt to relate the hours claimed to any particular entries on their attorneys' time sheets. In addition, even though some of the negotiations may have related to issues on which we have determined petitioners were ultimately successful, petitioners have not limited their claim to only those hours. Their compensation request embraces all hours expended on settlement negotiations. Moreover, they have cited no authority in support of their claim that they are entitled to attorneys' fees for the time spent on unsuccessful settlement negotiations.

Under the circumstances, we conclude that petitioners are not entitled to any of the hours claimed to have been expended on unsuccessful settlement discussions.

G. Fee Petition

[11] NRDC et al. assert that their attorneys expended 43.55 hours (40.75 by Galloway and 2.80 by Meyerhoff) preparing and filing this fee petition and that all that time is compensable. West Elk concedes that time incurred in seeking legitimate attorneys' fees is compensable. It argues, however, that where the fee petition is denied in whole or in part, the hours claimed should be reduced accordingly, citing Utah International, 643 F. Supp. at 831.

It is clear that hours reasonably expended in establishing an entitlement to a fee award are compensable. 43 CFR 4.1295 (b); Hernandez v.

George, 793 F.2d 264, 269 (10th Cir. 1986). The Utah International court limited that rule when it stated that "[o]nly time spent seeking fees which were actually awarded is compensable." Utah International, 643 F. Supp. at 831. Thus, awards for time expended on fee petitions are limited by the "degree of success" achieved by the petitioner in the other phases of the proceeding.

In this case petitioners seek compensation for a total of 2,428.61 hours of attorney work exclusive of the hours claimed for the fee petition. Of that total we have determined that petitioners reasonably expended 763.75 hours or 31 percent of the total requested. There-fore, applying that same percentage to the hours claimed for the fee petition, petitioners are entitled to recover for 13.50 hours for the fee petition. 23/

VI. REASONABLE HOURLY RATE

[12] Having determined the number of hours reasonably expended on qualifying work, we turn to a consideration of the reasonable hourly rate which should be applied to those hours in order to arrive at the "lodestar" amount.

23/ In connection with NRDC et al.'s reply to the objections raised by OSMRE and West Elk to the fee petition, they assert that they are entitled to an award for time expended in drafting that reply. We agree. Accordingly, NRDC et al. will be afforded an opportunity to file a supplement to their fee petition, setting forth the number of hours for which they seek compensation in this respect. Such a supplement must be filed within 30 days of receipt of this decision. The opposing parties will have 30 days from receipt of this supplement to respond thereto.

NRDC et al. contend that, with respect to each of the four attorneys involved in this proceeding, they are entitled to the prevailing rate as of 1985 for comparable work "in the Washington, D.C. legal community" because the case was litigated and decided by the Board in that area 24/ (Petition at 29). They submit a number of affidavits from practicing attorneys and other evidence in support of those purported prevailing rates, as well as documentation on the background and experience of their four attorneys. Given that experience and demonstrated skill, petitioners contend that Meyerhoff and Galloway are entitled to be compensated at the rate of $165 per hour, while Bishop and Hanson should command $125 per hour. Id. at 23.

The Supreme Court has stated that the reasonable hourly rate will normally be considered that rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," as demonstrated by satisfactory evidence. Blum v. Stenson, 465 U.S. at 896 n.11; see also Copeland v. Marshall, 641 F.2d at 892. However, despite that general statement of the law regarding reasonable hourly rates, there has been considerable conflict in the Federal Circuit Courts of Appeal concerning how to calculate the counsel fees for attorneys who operate a private law firm, but who customarily charge fees below the prevailing community rate in order to serve a particular type of client. In

24/ West Elk generally challenges the use of multiple lawyers, contending that this constituted a duplication of effort (West Elk Response, Attachment D, at 3-4). This raises the question of whether the hours worked by each of the attorneys on the same matters were reasonably expended. See Copeland v. Marshall, 641 F.2d at 891. We conclude that there is no evidence that the four attorneys employed by petitioners engaged in duplica-tion of effort. Rather, Galloway states in his Jan. 2, 1987, declaration at pages 7-8 (Petition, Attachment 1), that there was little or no duplication because each attorney was assigned a separate area of work.

Student Public Interest Research Group of New Jersey, Inc. (SPIRG) v. AT&T Bell Laboratories, 842 F.2d 1436 (3rd Cir. 1988), the court identified and discussed three separate approaches taken by courts of appeals. The first was the "billing rate rule" adopted in the District of Columbia and Eighth Circuits (Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, rehearing en banc granted, 830 F.2d 1182 (D.C. Cir. 1987); Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985); Shakopee Mdewakanton Sioux Community v. City of Prior Lake, 771 F.2d 1153 (8th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)), which directs use of actual billing rates whenever they exist, without regard to the fact that rates may be set artificially low to service the public interest. SPIRG, 842 F.2d at 1443.

Under the "micro-market" rule, endorsed in the Seventh and Eleventh Circuits (Lightfoot v. Walker, 826 F.2d 516 (7th Cir. 1987); Mayson v. Pierce, 806 F.2d 1556 (11th Cir. 1987)), market, rather than actual billing, rates are utilized, but the market is restricted to market rates for other public interest lawyers. Id. at 1445-46.

The SPIRG court rejected those two approaches in favor of the "community market rate rule," adopted by the Ninth and, apparently, the First Circuits (Maldonado v. Lehman, 811 F.2d 1341 (9th Cir. 1987), cert. denied, ___ U.S. ___, 108 S. Ct. 480 (1987); Hall v. Ochs, 817 F.2d 920 (1st Cir. 1987)). Under that rule, courts assess the experience and skill of the

attorneys and compare their rates to those of comparable attorneys in the community. SPIRG, 842 F.2d at 1447. 25/

Since the SPIRG court's decision, the Court of Appeals for the District of Columbia Circuit has reversed its position on the billing rate rule. In Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988), the court expressly overruled the Laffey decision regarding the rate to apply and held: "Henceforth, the prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals" (Id. at 1524). Thus, the D.C. Circuit has also adopted the community market rate rule.

Our review of the cases considering this issue leads us to the conclusion that the community market rate rule is the proper approach for the present case.

We now address the issue of whether the market rate is the "current" rate, as argued by petitioners, or the historic market rates prevailing at the time of the proceedings herein, as argued by West Elk and OSMRE.

25/ The court also considered another method which had not been accepted in any of the circuits--the modified billing rate rule--which would utilize the actual billing rate plus a contingent multiplier. Although the court found certain aspects of the rule attractive, it declined to adopt it. Id. at 1446-47.

While there is some case precedent for applying current rates (Ramos v. Lamm, 713 F.2d at 555), it is now settled that historic rates are to be applied in computing the lodestar amount. See Library of Congress v. Shaw, 478 U.S. 310, 321 (1986). In Utah International, 643 F. Supp. at 830, the court determined that the protracted nature of proceedings resulting in delay in the assessment of attorneys' fees did not justify use of current rates as a method to compensate for such delay or as a shortcut for computing interest. The court's determination was based on its analysis of the Shaw decision and the Supreme Court's conclusion that the doctrine of sovereign immunity precludes the reading of Federal statutes to permit interest to run on a recovery against the United States, unless Congress affirmatively mandates that result. Thus, the court held in reliance on Shaw that, since section 525(e) of SMCRA did not waive the Government's sovereign immunity with regard to interest awards, awards of attorneys' fees under SMCRA should be computed "on the basis of historical rates." Id. Historic rates reflect the rates in effect at the time the work was performed. Thus, in Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d at 1525, the court remanded the case for the limited purpose of having the district court make "findings as to the reasonable hourly rates at the time the services were performed." We conclude that historic rates are properly applied in this case to compute the lodestar amount in determining OSMRE's liability for attorneys' fees.

Next, we must answer the question of what is the relevant community for purposes of determining the reasonable hourly rate. Petitioners claim Washington, D.C., rates are applicable for all four attorneys for all

aspects of these proceedings. West Elk objects, contending that Colorado is the "relevant community," because that is where the hearing was held (West Elk Response at 40). West Elk notes that hourly rates relied on in Utah International, 643 F. Supp. at 830 n.38, were the prevailing rates in the community where "the judicial proceedings were located." Similarly, in Ramos v. Lamm, 713 F.2d at 555, the court concluded that, absent unusual circumstances, the hourly rates will be determined "based upon the norm for comparable private firm lawyers in the area in which the court sits." See also Council of the Southern Mountains, Inc. v. OSMRE, 3 IBSMA at 55.

In this case petitioners have broken down the work done in the various proceedings into the seven categories discussed supra. For one of those categories, unsuccessful settlement negotiations, we found the work noncompensable. All the other categories, except proceedings before Judge Torbett, involved activities before either IBSMA or this Board. IBSMA was, during its existence, located at the same situs as this Board - Arlington, Virginia, a suburb of Washington, D.C. While Judge Torbett's office was in Knoxville, Tennessee, he traveled to Denver, Colorado, to conduct the hearing in this case.

These facts suggest that two prevailing rates may be used depending upon whether the award is to be made for work before Judge Torbett or for the other proceedings, i.e., one for Denver and the other for the Washington, D.C., area.

Petitioners argue, however, that this case presents unusual circumstances which justify the use of rates other than those prevailing where the

proceedings took place. Petitioners assert that where a proceeding requires counsel with specialized expertise such that local counsel could not render satisfactory services, the courts have approved the use of hourly rates from outside the local area. They cite, inter alia, Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, 769 (7th Cir. 1982), cert. denied, 461 U.S. 956 (1983), and Maceira v. Pagan, 698 F.2d 38, 40 (lst Cir. 1983), in support of that argument.

The present case involved the interpretation of SMCRA and its implementing regulations. At the time of the filing of the petition for review and during the subsequent proceedings, no significant body of law existed regarding SMCRA and little or none regarding the permitting process. Thus, petitioners claim that in this case the necessity for specialized expertise was absolutely essential and they quote from the court's decision in Save Our Cumberland Mountains, Inc. v. Hodel, 622 F. Supp. 1160, 1164 (D.D.C. 1985), rev'd on other grounds, 826 F.2d 43 (D.C. Cir. 1987), which described Galloway as "on[e] of the leading experts on the Surface Mining Act."

We are well aware of and have no reason to doubt Galloway's expertise in the surface mining area. Moreover, the cases cited by petitioners clearly support the use of rates from outside the local area. Nevertheless, we fail to see how Galloway's expertise, which would justify application of Washington, D.C., rates for all his work in the present case regardless of the situs of the proceedings, also supports a claim for Washington, D.C., rates for all aspects of this case for the other three attorneys in this case, especially when Meyerhoff and Hanson were located in San Francisco and

Denver, respectively, during the relevant time periods. Therefore, we conclude as follows regarding the prevailing historic rates to be applied in this case for each of the attorneys: Galloway is entitled to Washington, D.C., rates for all claims; Meyerhoff, Bishop, and Hanson may receive Washington, D.C., rates for all work, except for the category of proceed-ings before Judge Torbett. 26/ Work performed in that category by those three attorneys is compensable at the prevailing historic rates for Denver, Colorado. 27/

The bulk of the evidence submitted by NRDC et al. relating to reasonable hourly rates concerns current rates as of 1985. NRDC et al. suggest, however, that the historical rates adopted by the district court in Save Our Cumberland Mountains, Inc. v. Hodel, 651 F. Supp. 1528 (D.D.C. 1986), for Galloway and Bishop provide a useful standard. 28/ In that case, the court adopted rates for Galloway for the years 1981 to 1985 and for Bishop for

the years 1981 to 1983. Id. at 1541. We will apply those rates, where

---

26/ West Elk contends that Meyerhoff should not be compensated where he participated in the proceedings as a client. See West Elk Response, Attachment G, at 3-4. In his December 1986 statement, Meyerhoff indicates that, while affiliated with NRDC, he served as "counsel for NRDC" in these proceedings (Petition, Attachment 9, at 1). Meyerhoff's time records reflect such participation. It is well established that so-called public interest attorneys can recover attorneys' fees. See Utah International, 643 F. Supp. at 831.

27/ Petitioners state that in the event the Board finds Denver, Colorado, rates to be applicable, it will submit affidavits regarding those rates.

28/ OSMRE argues that any rates adopted by the Board should not exceed those "claimed" by Galloway and Bishop in that case (OSMRE Opposition at 20). It is clear that OSMRE is not referring to the rates claimed by

those attorneys, but rather those rates actually charged by the attorneys, as reported to the court. The court, however, explained in cogent terms

why it adopted the rates it did, in particular adopting higher rates for Galloway than those actually charged by him, in order to conform to the prevailing market rate. See 651 F. Supp. at 1540-41. We adopt that analysis.

applicable herein, since the district court determined those rates to be prevailing historic market rates for Washington, D.C., and, therefore, that approach is consistent with the circuit court's recent decision in Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C Cir. 1988). In addition, we recognize that certain work in the present case spanned a period of time following the years covered in that case. For Galloway and Meyerhoff, we will apply their requested rate for work performed in 1986 ($165). This is clearly in line with those rates reported for 1985 and 1986 in the statements, respectively, of Arthur F. Mathews and Brent N. Rushworth submitted by NRDC et al. (Petition, Attachments 3 and 6). In the case of Hanson, we will apply his requested rate for work performed in 1985 ($125). Again, this is in line with the Mathews and Rushworth statements.

In summary, we conclude that the following reasonable hourly rates apply for Galloway--1981-$115; 1982-$125; 1983-$150; 1985-$150; and 1986-$165. 29/ For Meyerhoff, who graduated from law school the same year as Galloway (1972) and whose experience level was nearly comparable to that of Galloway's, the rates will be the same as Galloway's, except for the year 1982 when his rate must be the community market rate for attorneys of comparable experience in Denver, Colorado. The rates for Bishop are $85 for 1981 and for 1982 his rate must be the community market rate for attorneys of comparable experience in Denver, Colorado. NRDC et al. have not sought fees in this case for Bishop after 1982.

29/ None of the attorneys claims compensable hours in 1984; therefore, we need not establish a rate for that year. Where the category of work spanned 2 or more years, and we cannot, because of the methodology utilized in determining the compensable hours, identify the specific time when the work was done, we will apply an average rate to that work.

Hanson graduated from law school in 1976, the same year as Bishop. We will adopt, for his rates, for the years 1981, 1982 (for work before the Board), and 1983, the rates set by the Save Our Cumberland Mountains court (651 F. Supp. 1528) for Bishop--1981-$85; 1982-$90; 1983-$90. For his work before the Administrative Law Judge in 1982, Hanson may receive the community market rate for attorneys of comparable experience in Denver, Colorado. For the year 1985, based on the information submitted by petitioners in their Petition regarding community market rates for Washington, D.C., and Hanson's level of experience, we establish his rate as $125 for 1985.

Thus, in order to complete adjudication of the fee petition, petitioners must supply the Board with the rates they seek for Meyerhoff, Bishop, and Hanson for the year 1982 based on the historic community market rates for attorneys of comparable experience in Denver, Colorado. See also note 23, infra.

VII. CALCULATION OF "LODESTAR" AMOUNT

Having determined the number of hours reasonably expended by the attorneys representing NRDC et al. and their reasonable hourly rates, except to the extent indicated above, the remaining task with respect to attorneys' fees is calculation of the "lodestar" amount. That calculation is reflected in Appendix B. It is incomplete, however, because of the necessity for the rates for Denver, Colorado.

VIII. MULTIPLIER

[13] We will briefly address the question of whether NRDC et al. are entitled to a multiplier in this case. In cases where the "lodestar" amount does not fully compensate a prevailing party, that amount may be enhanced by an upward adjustment in order to arrive at a "reasonable fee." Save Our Cumberland Mountains, Inc. v. Hodel, 651 F. Supp. at 1541. NRDC et al. seek, in the absence of application of current hourly rates, an upward adjustment in the "lodestar" amount based on the delay in the award, the contingency of the award, and the quality of the representation (Petition at 3). They seek a "modest multiplier." Id. at 36. Based on our analysis, we conclude that NRDC et al. are not entitled to an upward adjustment in the "lodestar" amount.

With respect to the quality of the representation, it is presumed that a high quality of representation was afforded consistent with the prevailing market rate, which rate forms the basis for the "lodestar" amount. Thus, no upward adjustment is permitted because of this factor. Save Our Cumberland Mountains, Inc. v. Hodel, 651 F. Supp. at 1542.

With respect to the contingency of the award, we will apply the test enunciated in Save Our Cumberland Mountains, Inc. v. Hodel, 651 F. Supp. at 1543, which requires that the evidence establish that:

> (l) The risk of nonpayment was greater than the normal risk of nonpayment and the lodestar rate must not reflect this added risk; (2) the attorneys must not have adequate fee arrangements with their client and therefore must have shouldered a substantial risk

of nonpayment; and (3) the success and impact of the case was exceptional.

Where these elements are satisfied, an upward adjustment is justified on the basis that it encourages attorneys to prosecute risky cases which ultimately achieve exceptional results. Id.; see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, ___ U.S. ___, 107 S. Ct. 3078 (1987).

We do not regard the present case as satisfying the test set forth above. We are not aware of the fee arrangement between NRDC et al.'s attorneys and their clients. Thus, we can make no specific findings regarding the risk of nonpayment. 30/ However, we do find that the success and impact of the case were not exceptional. We recognize that the success achieved was important in the sense that the deficiencies in the original OSMRE permit approval process for the Mt. Gunnison No. 1 mine were identified. However, as noted supra, that success was limited. In addition, there is no evidence that the impact of the case reaches beyond its limits. This case clearly did not result in the "major breakthrough in mining regulation" experienced in Save Our Cumberland Mountains, Inc. v. Hodel, 651 F. Supp. at 1544. Accordingly, no upward adjustment will be granted because of the contingency factor.

Finally, with respect to the delay in the award, the Supreme Court pronouncement in Shaw indicates that no enhancement of the "lodestar" amount

30/ See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, ___ U.S. ___, 107 S. Ct. 3078 (1987), for a discussion of adjustments for the risk of nonpayment.

is permitted because of any delay in receipt of an award of attorneys' fees, unless specifically mandated by Congress. Utah International, 643 F. Supp. at 830; see also Save Our Cumberland Mountains, Inc. v. Hodel, 651 F. Supp. at 1543 n.10. Section 525(e) of SMCRA contains no such mandate. As the Court stated in Shaw:

> Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money. The no-interest rule has been applied to prevent parties from holding the United States liable on claims grounded on the belated receipt of funds, even when characterized as compensation for delay. [Citation omitted.]

478 U.S. at 322. 31/ Accordingly, we will not apply an upward adjustment in this case based on delay.

IX. COSTS AND EXPENSES

Having established their eligibility and entitlement to an award of attorneys' fees under section 525(e) of SMCRA, 30 U.S.C. | 1275(e) (1982), NRDC et al. are also entitled to an award of other costs and expenses reasonably incurred by them in the prosecution of this case. In their Petition, NRDC et al. claim a total of $16,683.79 in costs and expenses, which

encompass the costs of postage, photocopying, long-distance telephone calls,

---

31/ However, we note that in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, ___ U.S. ___, 107 S. Ct. 3078 (1987), a case involving a claim for attorneys' fees under sec. 304(d) of the Clean Air Act, 42 U.S.C. | 7604(d) (1982), in which the issue of delay was not presented, the Court nevertheless stated that "[w]e do not suggest, however, that adjustments for delay are inconsistent with the typical fee-shifting statute." 107 S. Ct. at 3082. The Court made no attempt to reconcile this statement with its express holding in Shaw, although, in Shaw, fees were being sought from the U.S. Government.

courier services, taxis and the subway, secretarial overtime, reporting services, temporary secretarial services, books, air delivery and Federal Express, and travel. NRDC et al. itemized these costs and expenses by attorney and category. See Petition at 37. With the exception of travel expenses for Meyerhoff, all the costs and expenses are attributed to Galloway, Bishop, and Hanson. In a supplement to the Petition, the expenses claimed for Hanson were adjusted downward from $914.92 to $809.28. The supplement included Hanson's itemization of those expenses. Thus, the adjusted expenses sought are $1,046.59 for Meyerhoff, $3,310.45 for Bishop, $809.28 for Hanson, and $11,411.83 for Galloway, for a total of $16,578.15.

In another supplement to the Petition, NRDC et al. state that they spent an additional $19,082.52 for the professional services of LRCWE, of Denver, Colorado. Attached to the supplement is a statement by Leslie H. Botham, Vice President of LRCWE, who states that, between November 1981 and July 1982, LRCWE reviewed the adequacy of the analysis in the permit application of the "hydrologic impact" of the proposed Mt. Gunnison No. l Mine and the "cumulative hydrologic impact of mining in general in the region" and testified at depositions and at the hearing. Also attached to the supplement are relevant billing statements from LRCWE, which indicate the amounts charged for the services of various employees of LRCWE and other costs. Petitioners seek, in accordance with the percentage sought under Section V. C. Work Before the Administrative Law Judge, 69 percent of $19,082.52 or a total of $13,166.94.

[14] We will deal first with the question of whether NRDC et al. are entitled to recover their costs and expenses with respect to LRCWE. West Elk contends that NRDC et al. are not entitled to any recovery where the supplement to the Petition was "not timely filed" (West Elk Response at 38). We presume that West Elk is again alluding to 43 CFR 4.1292(a), which, as we have construed it herein, requires that a fee petition be accompanied by an affidavit "setting forth in detail all costs and expenses," as well as receipts or other evidence of such costs and expenses. The supplement clearly did not accompany the Petition. However, OSMRE, West Elk, and the State have had ample opportunity to challenge the expenses claimed. Therefore, in the absence of any regulatory sanction for a late filing, we will consider the merits of NRDC et al.'s claim for such expenses, since 43 CFR 4.1295(a) specifically provides for awards for expert witness fees.

OSMRE contends that NRDC et al. are not entitled to recover any expenses associated with LRCWE because LRCWE was employed to contradict ARCO's analyses of hydrologic impact, not OSMRE's PCI assessment. We disagree; LRCWE's attention was not so limited. The analyses submitted by ARCO with its permit application were reviewed and in part relied upon by OSMRE in making its PCI assessment. It appears clear that the work of LRCWE contributed materially to NRDC et al.'s presentation of their case before Judge Torbett regarding issues associated with the question of the hydrologic impact of mining. Those issues are in part related to NRDC et al.'s successful claim that OSMRE's PCI assessment was inadequate. Thus, NRDC et al. are entitled to some recovery, but not in the amount sought. The amount

of the recovery will be calculated based on our methodology for determining the number of hours reasonably expended before the Administrative Law Judge. See Section V. C. Work Before the Administrative Law Judge, supra. The PCI assessment section of the brief before Judge Torbett contained 44 pages. Forty-four pages out of the adjusted total of 127 pages is 35 percent. Petitioners are entitled to expert witness fees of 35 percent of $19,082.52 or $6,678.88.

With respect to other costs and expenses, West Elk objects to any recovery because of the absence of receipts or other evidence of such, as required by 43 CFR 4.1292(a)(2) (West Elk Response at 37). However, the costs and expenses claimed by NRDC et al. are either supported by signed statements from the attorneys on whose behalf they were incurred or represented in the Petition itself. This constitutes sufficient "evidence" of such costs and expenses.

[15] The question of whether to allow an award for expenses turns on whether such expenses are routinely billed to clients or absorbed as part of the lawyer's overhead. Ramos v. Lamm, 713 F.2d at 559; Save Our Cumberland Mountains, Inc. v. Hodel, 622 F. Supp. at 1167. In Ramos, the circuit court affirmed the district court's rejection of a request for reimbursement for photocopying, postage, telephone calls, books, and overtime secretarial work where such costs were "normally absorbed as part of the firms' overhead." Ramos v. Lamm, 713 F.2d at 559. In the present case, Galloway asserted in his January 1987 statement that the expenses attributed to him were "of

the type I normally pass along to clients" (Petition, Attachment 1, at 8). These types of expenses were approved for reimbursement by the court in Save Our Cumberland Mountains, Inc. v. Hodel, 651 F. Supp. at 1546, in which both Galloway and Bishop were involved. The evidence indicates that the expenses were reasonably incurred by NRDC et al. Accordingly, we conclude that they are entitled to an award with respect to those reported expenses.

Petitioners are not, however, entitled to be compensated for all of the reported expenses. As with attorneys' fees, compensation for such costs and expenses must be commensurate with the "degree of success" achieved by NRDC et al. In Utah International, the court awarded expenses only with respect to those phases of the proceeding in which the petitioners prevailed.

In this case we will examine the total number of compensable hours claimed by each attorney and compare those figures with the actual total hours found to be compensable. The percentages derived from those comparisons will be applied to the costs and expenses claimed by each attorney.

Galloway claimed 1,163.30 compensable hours. We found him entitled to an award for 419.75 hours or 36 percent of the hours claimed. He seeks compensation for $11,411.83 in costs and expenses. We believe application of the 36-percent figure to those costs and expenses provides a reasonable award. Galloway is entitled to $4,108.26 for costs and expenses.

Bishop sought compensation for 713.62 hours of legal work. We found him entitled to 201.60 hours or 28 percent of the hours claimed. Applying

that same percentage to his costs and expenses results in an award of $926.93 (28 percent of $3,310.45).

Hanson claims $809.28 in costs and expenses. We found him entitled to 22 percent of the hours for which he sought compensation (100.25 hours of 461.17 hours). We find he is entitled to 22 percent of his costs and expenses or $178.04.

We found Meyerhoff to be entitled to 56.55 hours or 42 percent of the claimed compensable hours of 134.07. Applying that same percentage to his claimed travel expenses of $1,046.59 results in an award of $439.57.

Accordingly, based on the present record, NRDC et al. are hereby awarded costs and expenses, including attorneys' fees, to the extent set out in Appendix B and Appendix C.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Petition of NRDC et al. is approved in part, as set forth above, and NRDC et al. are granted 30 days from receipt of this decision to submit to the Board information establishing the historic hourly market rate for 1982 for the community of Denver, Colorado, and the hourly rates for Bishop, Hanson, and Meyerhoff, based thereon. NRDC et al. shall have the same amount of time to file the information discussed in note 23, supra. OSMRE, or any other party, shall have 30 days from receipt of those submissions to file any desired response. The Board will entertain no reargument on the merits of this decision in

those submissions. Upon receipt of the information from NRDC et al. and any responses thereto, the Board will act expeditiously to complete the calculation of the attorneys' fees and the total award.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Will A. Irwin
Administrative Judge

APPENDIX A

SUMMARY OF THE TIME RECORD ENTRIES FOR GALLOWAY, BISHOP, AND HANSON FOR WHICH HOURS ARE ALLOWED FOR PROCEDURAL MATTERS BEFORE IBSMA. ALL OTHER ENTRIES FOR THE DATES AUGUST 12, 1981, THROUGH FEBRUARY 24, 1982, HAVE BEEN REVIEWED AND FOUND NOT TO BE COMPENSABLE.

GALLOWAY

DATE	HOURS	HOURS ALLOWED	
			August 1981
08/12	2.00	2.00	Conference with Bishop re procedure issues; review of proposed procedures for case; discussions with DOI re their position on case.
08/14	1.50	1.50	Call from ARCO attorney re filing; call from clients re filing; conference with L. Bishop re approach on procedural issues.
08/18 [sic]	4.00	4.00	Call to Carolyn Johnson re status; update; call from ARCO lawyer re case; call to Walt Morris re case; work on procedural issues; call from Don Crane re case.
08/17	0.75	0.75	Call to Kent Hanson re federal appeal and allocation of work; call to NRDC re schedule.
08/24	0.25	0.25	Conference with L. Bishop re development of BD [Board] procedures.
08/25	2.25	2.25	Conference call from DOI attorneys re OSM position; call to client re our position; conference with L. Bishop re approach to case and possible positions.
08/26	6.00	4.00	Calls from and to Walt Morris re DOI position; call from ARCO; calls to Kent Hanson and Carolyn Johnson; conference with L. Bishop re status position; draft settlement position.
08/30	7.25	7.25	Calls to Carolyn Johnson re response to DOI order; review order; outline response; start draft on response.

DATE	HOURS	HOURS ALLOWED	
08/31		4.75	4.75 Calls to M. Squillace re order; conference with L. Bishop re response to Bd Order, edit response; call to Carolyn Johnson re same.
			<u>September 1981</u>
09/01		6.00	4.00 Prepare for and call from ARCO re settlement; call to client in Denver; meeting with NRDC-Washington; conference with L. Bishop re work on order; call to K. Hanson re same.
09/03		5.00	2.00 Calls from M. Squillace re OSM/ARCO meetings; call to K. Hanson re same; conference with L. Bishop re approach; work on background to stay motion; edit memorandum on citizen part suits.
09/04		4.75	4.75 Call from M. Squillace re case; conference with L. Bishop re structure of brief and type of hearing required; research legislative history on permit hearings.
09/05		2.00	1.00 Work on response to Board order; review stay standards.
09/06		1.50	1.50 Continue work on response of procedures for review of permit; review and research APA case law.
09/08		3.50	1.25 Work on case law section of [stay] brief; review legislative history on permit hearings; conference with L. Bishop re same.
09/09		5.25	1.75 Edit citizen section of brief; conference with Bill Jordan re this section; call to M. Squillace re case; review and edit findings section; review and research "reasoned basis" cases.
09/10	10.00	3.00	Work on response on "no specific findings" section; review and research case law; research analogous proceedings; edit; conference with L. Bishop and B. Jordan re standing; calls to and from M. Squillace re motions.

107 IBLA 412

DATE	HOURS	HOURS ALLOWED	
09/11		8.25	2.75 Edit brief; call to Carolyn Johnson; calls and conference with Walt Morris and M. Squillace re case; conference re NRDC claim.
09/12		7.25	2.50 Work on response to BD order; research, edit, and drafting; prepare footnotes.
09/13		8.00	2.50 Continue work on response; call to Carolyn Johnson re edit; inclusion of comments.
09/14		4.75	1.50 Continue edit of response; call to Carolyn Johnson re BD stay; call to M. Squillace re stay.
09/15		2.75	1.00 Work on response to BD order and relevant issues; research on procedural regulations and response to motion to dismiss.
09/23		3.75	1.00 Conference with L. Bishop on claim; conference re allocation of work on brief; work on brief.
09/24		5.00	4.00 Review record of permit case at OSM office; conference with L. Bishop re status; calls re settlement proposals.
09/25		3.00	1.00 Continue work on ARCO response; call from client re changes in response.
09/26		4.75	1.50 Work on filing; edit various responses to be filed on September 28.
09/27		5.25	1.75 Work on filing; edit motion to stay; edit and proof response; edit and review cases on time delay; edit response to motion to stay.
09/28		6.75	2.25 Final work on filing; call from Tom Linn re settlement; call to OSM re case.
			<u>October 1981</u>
10/05		2.00	1.00 Edit response to motion to dismiss; continue work on settlement; call from client re status of case.

DATE	HOURS	HOURS ALLOWED	
10/13		6.00	4.00 Call from T. Linn re settlement; call to Carolyn Johnson re settlement position; continue to work on settlement proposal; call from M. Squillace; edit and file response to [OSMRE] motion to dismiss; call to Bd re same.
			February 1982
02/01		2.00	2.00 Start work on response to January 28 order; review federal permitting regulations and subchapter D.
02/03		2.00	2.00 Draft response to Board Order of January 28; review regulations re same.

TOTAL HOURS ALLOWED FOR GALLOWAY: 76.75

BISHOP

DATE	HOURS	HOURS ALLOWED	
			August 1981
08/14	0.25	0.25	Confer with Galloway regarding case.
08/25	1.50	1.50	Confer with client and co-counsel regarding case strategy.
08/26	1.50	1.50	Confer with client and co-counsel, discuss expert witness availability with consultant.
08/28	0.25	0.25	Discuss status with Galloway.
08/31	4.50	4.50	Review papers filed in reply by OSM, confer regarding same with client and Galloway.
			October 1981
10/13	2.00	2.00	Review file, [OSMRE] motion to dismiss, confer with OSM counsel.
10/21	3.50	1.00	Confer with Galloway regarding settlement, discuss numbers with consultant, redraft settlement agreement, confer with Galloway and expert regarding technical documents.
10/30	0.50	0.50	Conference with expert.

TOTAL HOURS ALLOWED FOR BISHOP: 11.50

HANSON

DATE	HOURS	HOURS ALLOWED	
			October 1981
10/06	0.30	0.30	Review motion to dismiss [OSMRE] and [OSMRE] response.
10/14	0.50	0.50	Office conference with Carolyn Johnson re hydrology issues.

TOTAL HOURS ALLOWED FOR HANSON: 0.80

APPENDIX B

GALLOWAY

Preliminary Work	Hours Claimed	Hours Allowed	Rate	Award
(6/81-8/11/81)	27.75	4.30	$115.00	$494.50
Procedural Issues				
(8/12/81-2/24/82)	298.25	72.75 (1981)	115.00	8,366.25
		4.00 (1982)	120.00	480.00
Before ALJ				
(2/25/82-9/17/82)	521.30	226.65	125.00	28,331.25
Before Board				
(9/18/82-9/27/85)	87.75	35.95	140.00*	5,033.00
For Relief				
(9/28/85-1/6/86)	63.50	63.50	150.00**	9,525.00
Settlement				
(Fall 81-Summer 82)	171.00	-0-		
Fee Petition				
(1986)	40.75	12.60	165.00	2,079.00

$52,230.00

MEYERHOFF

Preliminary Work	Hours Claimed	Hours Allowed	Rate	Award
(6/81-8/11/81)	-0-			
Procedural Issues				
(8/12/81-2/24/82)	-0-			
Before ALJ				
(2/25/82-9/17/82)	116.50	50.65	Denver	
Before Board				
(9/18/82-9/28/85)	-0-			
For Relief				
(9/28/85-1/6/86)	5.00	5.00	$150.00**	$750.00
Settlement				
(Fall 81-Summer 82)	9.00	-0-		
Fee Petition				
(1986)	2.80	.90	165.00	148.50

* Represents average of hourly rates for the years in which compensable hours were allowed in the category.

** No hours claimed for 1986.

BISHOP

Preliminary Work	Hours Claimed	Hours Allowed	Rate	Award
(6/81-8/11/81)	20.00	7.50	$85.00	$637.50
Procedural Issues				
(8/12/81-2/24/82)	230.00	11.50	85.00	975.50
Before ALJ				
(2/25/82-9/17/82)	419.85	182.60	Denver	
Before Board				
(9/18/82-9/27/85)	-0-			
For Relief				
(9/28/85-1/6/86)	-0-			
Settlement				
(Fall 81-Summer 82)	43.75	-0-		
Fee Petition				
(1986)	-0-			____

HANSON

Preliminary Work	Hours Claimed	Hours Allowed	Rate	Award
(6/81-8/11/81)	142.30	-0-		
Procedural Issues				
(8/12/81-2/24/82)	40.70	.80	$85.00	$68.00
Before ALJ				
(2/25/82-9/17/82)	218.25	94.90	Denver	
Before Board				
(9/18/82-9/27/85)	11.10	4.55	102.00*	464.10
For Relief				
(9/28/85-1/6/86)	-0-			
Settlement				
(Fall 81-Summer 82)	54.70	-0-		
Fee Petition				
(1986)	-0-			____

* Represents average of the hourly rates for the years in which compensable hours were allowed in the category.

APPENDIX C

	Attorneys' Fee Award	Costs and Expenses Award	Total
GALLOWAY	$52,230.00	$4,108.26	$56,338.26
MEYERHOFF		439.57	
BISHOP		926.93	
HANSON		178.04	
EXPERT WITNESS FEES AWARDED			6,678.88

1